# THE FOLKLORE OF UNFAIRNESS

LUKE HERRINE*

*The Federal Trade Commission Act's ban on "unfair . . . acts and practices" would, on its face, seem to give the FTC an awesome power to define proper treatment of consumers in changing conditions. But even in a world of widespread corporate surveillance, ongoing racial discrimination, impenetrably complex financial products, pyramid schemes, and more, the unfairness authority is used rarely, mostly in egregious cases of wrongdoing. Why?*

*The standard explanation is that the more expansive notion of unfairness was tried in the 1970s, and it failed spectacularly. The FTC of this era was staffed by bureaucrats convinced of their own moral superiority and blind to the self-correcting dynamics of the market. When the FTC finally reached too far and tried to ban television advertising of sugary cereals to children, it undermined its own legitimacy, causing Congress to put pressure on the agency to narrow its definition of unfairness.*

*This Article argues that this standard explanation gets the law and the history wrong, and, thus, that the FTC's unfairness authority is more potent than commonly assumed. The regulatory initiatives of the 1970s were actually quite popular. The backlash against them was led by the businesses whose profit margins they threatened. Leaders of these businesses had become increasingly radicalized and well-organized and brought their new political clout to bear on an unsuspecting FTC. It was not the re-articulation of the unfairness standard in 1980 that narrowed unfairness to its current form, but rather the subsequent takeover of the FTC by neoliberal economists and lawyers who had been supported by these radicalized business leaders. The main limitation on the use of the unfairness authority since then has been the ideology of regulators charged with its enforcement. In fact, the conventional morality tale about the FTC's efforts in the 1970s are part of what keeps this ideology dominant.*

*A reconsideration of the meaning of unfairness requires situating the drama of the 1970s and 80s in a longer struggle over governance of consumer markets. Since the creation of the FTC, and even before, an evolving set of coalitions have battled over what makes markets fair. These coalitions can be divided roughly into those who favor norm setting by government agencies informed by experts held accountable to democratic publics and those who favor norm setting by business leaders made accountable via the profit motive. The meaning of "unfair . . . acts and practices" has been defined and redefined through these struggles, and it can and should be redefined again to reconstruct the state capacity to define standards of fair dealing.*

 For comments, discussion, and encouragement, thanks to Daniel Markovits, Jeff Gordon, Alex Kolokotronis, Amy Kapczynski, David Grewal, Corinne Blalock, Kate Redburn, Rick Perlstein, Sandeep Vaheesan, Sanjukta Paul, and participants in the 2020 Consumer Law Scholars Conference, especially Ramsi Woodcock, Sarah Dadush, and Rory Van Loo. For sharing their memories, thanks to Al Kramer, Tracy Westen, Dee Pridgen, and Bill Kovacic. Thanks finally to the wonderful editorial team at the *New York University Law Review*.

## Introduction

On June 13, 2007, Representative Barney Frank called the House Financial Services Committee to order. With foreclosures mounting and global capital markets teetering (Bear Sterns's downfall would begin a month and a half later) the Committee had brought before it representatives from the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), the Federal Reserve, the Office of Thrift Supervision (OTS), and the Federal Trade Commission (FTC). All of these agencies had authority to police "unfair or deceptive acts and practices" on consumer financial markets. How, the Committee wanted to know, had so many bad loans been issued without any of them stepping in? The scope of the fraud involved in the mortgage market had not yet become public, but it was already clear that many of the loans in default had been doomed to fail, structured with balloon payments, loaded up with all kinds of fees, and issued to borrowers that clearly would not be able to pay them absent constantly rising housing prices. If so, Senator Frank wanted to know, weren't those loans *unfair*? And didn't all of these regulators have the mandate to prevent "unfair . . . acts and practices" (in addition to "deceptive acts and practices"), as provided in the Federal Trade Commission Act? What was going on?[1]

The Federal Trade Commission Act's ban on "unfair . . . acts and practices" would, on its face, seem to give the FTC an awesome power to define proper treatment of consumers in changing conditions. But even in a world of widespread corporate surveillance, ongoing racial discrimination, impenetrably complex financial products, pyramid schemes, and more, the unfairness authority is used rarely, mostly in egregious cases of wrongdoing. Why?

The standard explanation is that the more expansive notion of unfairness was tried in the 1970s, and it failed spectacularly. The FTC of this era was staffed by bureaucrats convinced of their own moral superiority and blind to the self-correcting dynamics of the market. When the FTC finally reached too far and tried to ban television advertising of sugary cereals to children, it undermined its own legitimacy, causing Congress to put pressure on the agency to narrow its definition of unfairness.

This Article argues that this standard explanation gets the law and the history wrong, and, thus, that the FTC's unfairness authority is more potent than commonly assumed. The regulatory initiatives of the 1970s were actually quite popular. The backlash against them was led by the businesses whose profit margins they threatened. Leaders of these businesses had become increasingly radicalized and well-organized and brought their new political clout to bear on an unsuspecting FTC. It was not the re-articulation of the unfairness standard in 1980 that narrowed unfairness to its current form, but rather the subsequent takeover of the FTC by neoliberal economists and lawyers who had been supported by these radicalized business leaders. The main limitation on the use of the unfairness authority since then has been the ideology of regulators charged with its enforcement. In fact, the conventional morality tale about the FTC's efforts in the 1970s are part of what keeps this ideology dominant.

A reconsideration of the meaning of unfairness requires situating the drama of the 1970s and 80s in a longer struggle over governance of

---

1 *See Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong., 40 (2007) [hereinafter *Consumer Protection Hearings*].

consumer markets. Since the creation of the FTC, and even before, an evolving set of coalitions have battled over what makes markets fair. These coalitions can be divided roughly into those who favor norm setting by government agencies informed by experts held accountable to democratic publics and those who favor norm setting by business leaders made accountable via the profit motive. The meaning of "unfair . . . acts and practices" has been defined and redefined through these struggles, and it can and should be redefined again to reconstruct the state capacity to define standards of fair dealing.

John Dugan, then Comptroller of the Currency, answered first. "I think we need to be careful here," he said.[2] "[T]he unfair standard legally under the Federal Trade Commission Act is not a judgment about unfairness."[3] He did not explain what he meant, but Representative Frank responded, "I understand that."[4] Sheila Bair, then Chair of the FDIC, also agreed: "I would just say that there can be a restrictive legal standard."[5] She did not clarify either. But she offered an alternative: "If you are looking at the statutory language in this area, you might consider adding the term 'abusive' . . . a standard that is contained in HOEPA [Home Ownership and Equity Protection Act of 1994] . . . [which] is a more flexible standard to address some of the practices that make us all uncomfortable."[6] Deborah Platt Majoras, then Chair of the FTC, also agreed, despite first defending the honor of the FTC by declaring that "we have brought plenty of cases that attack unfair practices."[7] And she had a bit more of an explanation: "[I]t was Congress that went back to the FTC at one point and said you need to define what unfairness means, because of course Congress didn't want it to mean just whatever, whoever happens to be sitting in my seat thinks it means. So there is a standard."[8] Again, she did not explain the limits of the standard, but nobody seemed to care. "When was that?" Representative Frank wondered.[9] "I think it was in the 1980's," Chair Majoras replied.[10]

Congress took this testimony to heart. Three years later, after the worst of the global financial crisis had been contained, it passed the Dodd-Frank Wall Street Reform and Consumer Protection Act in an

---

2 *Id.*
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.* at 41.
8 *Id.*
9 *Id.*
10 *Id.*

effort to prevent such a crisis from happening again.[11] Much of the Act was devoted to consolidating the consumer financial protection authorities of the gallimaufry of agencies that appeared before the House Financial Services Committee into a single Consumer Financial Protection Bureau.[12] When Congress defined the authority of that Bureau, it took Sheila Bair's advice, banning not just "unfair or deceptive acts and practices" (UDAP) but "unfair, deceptive *or abusive* act[s] or practice[s]" (UDAAP).[13] Although in common usage any practice that could be described as "abusive" would seem to be "unfair" *a fortiori*, Congress added "abusive" to Dodd-Frank to *expand* the authority of the Consumer Financial Protection Bureau (CFPB).[14] It appears Congress was attempting to remove whatever it is about the unfairness standard that makes it "restrictive," to undo whatever it is that Congress did "in the 1980s."[15]

But what, exactly, did these financial regulators mean when they said that the FTC Act's prohibition on "unfair . . . acts and practices,"[16] despite its facial breadth, is "restrictive"?[17] Could a statute facially concerned with unfairness, "legally . . . not [involve] a judgment about unfairness"?[18] And what happened in Congress in the 1980s to cause these limitations?

The received wisdom, outlined in this Article in Part II, is that the FTC of the 1970s flew too close to the sun. The Commissioners became so caught up in their own moral authority that they lost sight of the self-correcting dynamics of markets and of the potentially perverse results of their own regulations. Things got so out of control that the Commission attempted to use its unfairness authority to ban television advertising to children (in the so-called "KidVid" rulemaking). Even the normally demobilized American consumer had enough with government paternalism. Facing pressure from the public, Congress began to consider eviscerating the unfairness authority altogether.

---

[11] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (aiming, *inter alia*, "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,'" and "to protect consumers from abusive financial services practices").

[12] § 1001, 124 Stat. at 1955.

[13] § 1031(a), 124 Stat. at 2005 (codified at 12 U.S.C. § 5531(a)) (emphasis added).

[14] *See* Patrick M. Corrigan, *"Abusive" Acts and Practices: Dodd-Frank's Behaviorally Informed Authority over Consumer Credit Markets and its Application to Teaser Rates*, 18 N.Y.U. J. Leg. & Pub. Pol'y 125, 130–39 (2015) (discussing pre-Dodd-Frank consumer protection law and emphasizing the presumption against surplusage when interpreting Congress's addition of "abusive" in Dodd-Frank).

[15] *Consumer Protection Hearings*, *supra* note 1, at 40.

[16] 15 U.S.C. § 45(a)(1).

[17] *Consumer Protections Hearings*, *supra* note 1, at 40.

[18] *Id.*

With this threat over its head, the FTC realized it needed to develop a neutral and scientific way to determine what counted as "unfair." It drew on the science of how markets work—i.e., neoclassical welfare economics—to release a "Policy Statement" that created the modern standard for unfairness. Via this new "substantial injury test," the FTC focused on the importance of facilitating free and informed consumer choice. The modern unfairness standard thus enacts the enduring American ideal of free enterprise, the story goes, while staying grounded in our best understanding of the way choice disciplines businesses in competitive economies. It was this standard that ran into trouble when faced with the systemic market failure of the mortgage crisis.

This Article argues that the received wisdom is mistaken. What happened at the FTC in the 1970s was not an eruption of popular discontent about a paternalist agency caught up in its own moral superiority but rather a well-funded backlash from the businesses that would have had to comply with the FTC's new regulatory initiatives. The regulatory initiatives of the 1970s were themselves the result of popular discontent—not at haughty bureaucrats, but at businesses manipulating markets to their advantage. Turning this discontent into regulatory initiative required years of organizing by an innovative consumer movement to disrupt the quiescent cronyism of postwar liberalism. The businesses who had benefited from that cronyism and who were facing a profit squeeze in the stagflationary 1970s mobilized their own discontent at the new regulations. In doing so, they expanded the influence of the nascent neoliberal movement, which had itself been built up by an earlier generation of more radical business leaders.[19]

In this backlash, quickly established and well-endowed influence organizations funded research, messaging, and lobbying outfits to promote the idea that markets are self-correcting so long as regulators do not get in the way of the "free choices" of consumers. It constructed the infrastructure of neoliberalism. This infrastructure primarily articulated the value of market ordering—the idea of one true "science" of the market—in the language of the Chicago School's version of neoclassical welfare economics. This discourse was also promoted as the only rational and nonpaternalistic form of policy analysis.[20]

When the FTC issued the Policy Statement that created the modern substantial injury test, it was defending the full scope of its authority *against* this business backlash. Thus, it was not limiting its

[19] *See infra* Part V.
[20] *See id.*

own authority. Rather, it was providing a new interpretation to make sense of how the regulatory initiatives of the 1970s fit with past FTC practice. Nor was the FTC adopting neoclassical welfare economics as the sole, or even the primary, way to understand the workings or the value of consumer markets. Instead, it was taking an ambiguous position that reflected both of the conflicting perspectives within the agency.[21]

It was only once the neoliberals took over control of the FTC that the narrowness of the modern unfairness authority and the notion that it forces the FTC to engage in neoclassical welfare economics became official doctrine. Those changes resulted not from a legal limitation but from an ideological shift among those who have applied it. When Ronald Reagan took office, he appointed James Miller as Chair. Under Miller's leadership, the FTC almost entirely abandoned its use of the unfairness authority in the name of promoting "consumer choice" and "self-regulation." Miller did everything he could to place neoclassical welfare economics—in its Chicago School iteration[22]—at the center of the FTC's deliberations while also promoting a cooperative relationship with business leaders. Unfairness, on this understanding, came to be viewed as a way to police only the most egregious consumer-facing practices and only on a case-by-case basis. When this general approach was carried over through the Clinton Administration, it became the consumer protection version of the Washington Consensus. Congress's codification of the substantial injury test in 1994 was widely understood as consolidation of the deregulatory effort. It was the taken-for-grantedness of neoliberal theories about market governance, and not the unfairness authority itself, that created the "restrictiveness" complained about at those hearings on the financial crisis.[23]

What is more, the standard story about what happened in the 1970s only became standard as a result of the ascendance of neoliberalism. Its account of the problems with the FTC in the 1970s, and its account of the history of unfairness more broadly, is the story told by the neoliberals who declared that the FTC was out of control at the time and who took control when Reagan took office. It became the shared wisdom as neoliberalism permeated both political parties, as a way to enforce a version of unfairness that was not really about unfairness. It has been passed down without revision since then.

---

21 *See infra* Section VI.A.

22 On the meaning of "neoclassical welfare economics" and the "Chicago School," see *infra* Section V.A. On Miller's role, see *infra* Section VI.A.

23 *See infra* Part VI.

To fully understand how unfariness took its contemporary form requires understanding how the controversy in the 1970s built on previous controversies. The regulatory efforts of the 1970s can be seen as one of an evolving set of progressive coalitions—Populists, then Progressives, then New Deal Liberals, then Consumerists—that have campaigned for public control over markets. And the business backlash and rise of neoliberal hegemony can be seen as the latest of a series of efforts by an evolving group of big-business-led coalitions to dismantle this capacity by emphasizing the market's ability to regulate itself.[24]

These struggles have not been previously discussed in any detail in the legal literature. So a proper reconsideration of the meaning of unfairness requires not just refocusing our lens but expanding its field. Accordingly, this Article provides a new account of the development of unfairness doctrine starting from its very inception. Part II explains why the Progressives that created the FTC defined its authority in terms of "unfair methods of competition": to modify a common law concept to prevent businesses from taking advantage of each other or of consumers. They were doing so as part of a project to build the state capacity to reassert social control over businesses that had grown too large for existing legal forms. Part III recounts how an authority designed as part of an antimonopoly agenda became a means of imposing consumer protective norms on businesses, and in particular, how efforts of a new Progressive coalition (self-identifying as "liberal" during and after the New Deal era) to regulate advertising led to the creation of the UDAP standard cementing the FTC's consumer protection authority. This authority largely lay dormant during World War II and the pro-business Eisenhower Administration, but was picked up again with the rise of a new liberal coalition in the 1960s. Part IV narrates how this coalition began to breathe life into the FTC's unfair acts and practices authority, first via the Cigarette Rule

[24] The creation of the CFPB can be seen as yet another iteration of this struggle. And the Trump Administration's recent narrowing of its mostly untested "abusive" authority, via its recent "Policy Statement," illustrates the relevance of consumer protection history for consumer protection's present. *See* Bureau of Consumer Fin. Prot., Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 85 Fed. Reg. 6733, 6736 (Feb. 6, 2020) (outlining the Bureau's intention to cite conduct as abusive "if the Bureau concludes that the harms to consumers from the conduct outweigh its benefits to consumers" and refrain from "challenging conduct as abusive that relies on all or nearly all of the same facts that the Bureau alleges are unfair or deceptive"). The Trump Administration was also in the process of attempting to rewrite the Department of Transportation's authority of unfair acts and practices. *See* Defining Unfair or Deceptive Practices, 85 Fed. Reg. 11,881 (proposed Feb. 28, 2020) (seeking comment in a Notice of Proposed Rulemaking to codify definitions for "unfair" and "deceptive" in regulations implementing an aviation consumer protection statute).

and then via the slew of regulatory actions that began in the 1970s. Part V explains the whiplash this coalition experienced when business rapidly organized to undermine its gains, taking advantage of the delegitimation of government that came with the stagflationary crisis of the 1970s. Part VI follows the entrenchment of the modern understanding of unfairness along with the entrenchment of neoliberalism more broadly. The Coda reflects on why this narrative undermines the morality tale and explores which possibilities it opens up.

But first let us set out the received wisdom in more detail.

## I
## The Standard Story

### *A. The Story the FTC Tells About Itself*

Four years before the Congressional hearings interrogating the limitations of unfairness authority in stopping the massive frauds that led to the financial crisis, the American Marketing Association is hosting its annual Marketing and Public Policy Conference at some hotel banquet hall in Washington, D.C. J. Howard Beales, the Director of the FTC's Bureau of Consumer Protection, is speaking. He is using the occasion to explain why he thinks it makes sense to bring some life back into the FTC's unfairness authority.[25] In doing so, he provides the best available condensation of the received wisdom about where the unfairness authority has been and where it is going. Let us listen in.

In 1938, Beales tells his audience, the FTC's consumer protection authority was defined in terms of a ban on "unfair or deceptive acts or practices."[26] For many years, unfairness was basically an afterthought. Deception led the way.[27] That changed in 1964, when the FTC attempted to regulate cigarette advertising after a scathing Surgeon General's report on the dangers of smoking.[28] As part of these proceedings, the FTC created the "Cigarette Rule," which birthed "a new theory of legal liability" that enabled Commissioners to impose their "personal values" onto everybody else with "no empirical basis."[29]

---

[25] J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, Fed. Trade Comm'n (May 30, 2003), https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection [hereinafter Beales Speech] (speech at Marketing and Public Policy Conference, Washington, D.C.).

[26] *Id.*

[27] *Id.* (observing the Commission "largely ignored the word 'or' in the [FTC Act]," and made no attempt to "distinguish between 'unfair' . . . and 'deceptive'" practices).

[28] *Id.*

[29] *Id.*

What enabled Commissioners to arrogate such unchecked power? The definition of "unfair" in the Cigarette Rule included anything that "offends public policy," is otherwise "immoral, unethical, oppressive, or unscrupulous," and which "causes substantial injury to consumers" or competitors.[30] According to Beales, the first two of these are dangerously subjective standards that effectively give blanket authority to bureaucrats to impose their vision of the world on the rest of us.[31] Moreover, the Cigarette Rule did not even create a check on these "paternalistic" regulators by requiring them to consider the cost of their edicts.[32]

Things took a turn for the worse in 1972, when the Supreme Court "emboldened" the FTC in its *Sperry & Hutchinson* decision by unanimously declaring that the Commission "like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[33] "Predictably" for bureaucrats with the incentives to expand their own power, the FTC produced "many absurd and harmful results."[34] Which results? The only example Beales provides is a proposed-but-not-adopted rule that "would have required advertisers to use only the precise terms the Food and Drug Administration required on product labeling."[35] He does not explain what made this potential rule absurd, nor why he chose a rule that was not adopted as an example of an FTC gone wild.

In any case, hubris always meets a tragic end. "The most prominent example of overreaching . . . led directly to the downfall of unfairness as a working legal doctrine."[36] Here, Beales is referring to the Children's Advertising Rulemaking (for which the beltway shorthand is "KidVid"). In Beales's telling, "the Commission tried to use unfairness to ban all advertising directed to children on the grounds that it was 'immoral, unscrupulous, and unethical' and based on generalized public policies to protect children."[37] Having "outraged many in business, Congress, and the media," the FTC, and particularly its controversial Chair Michael Pertschuk, faced a backlash that

[30] *Id.*; *see also* Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324 (July 2, 1964) (codified at 16 C.F.R. § 408.1) [hereinafter Cigarette Rule].

[31] *See* Beales Speech, *supra* note 25 (arguing the standards "often had no empirical basis, could be based entirely upon the individual Commissioner's personal values, and did not have to consider the ultimate costs to consumers of foregoing their ability to choose freely in the marketplace").

[32] *See id.*

[33] *Id.* (quoting FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972)).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

threatened its very existence.[38] Congress temporarily cut off funding, stripped the FTC of its ability to regulate advertising, and refused to reauthorize the FTC for over a decade.[39]

According to Beales, a "chastened" FTC rethought the meaning of "unfairness."[40] In seeking a more objective, neutral, and focused test, the Commission "moved away from public policy and towards consumer injury, and consumer sovereignty, as the appropriate focus."[41] The consumer sovereignty theory of unfairness was expressed in the Unfairness Policy Statement originally presented as a December 17, 1980 letter to Senators Wendell Ford and John Danforth—then the Chairman and Ranking Minority Member of the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation—and subsequently appended to the FTC's opinion in *International Harvester*.[42] That Policy Statement elevated the "consumer injury" prong of the Cigarette Rule, "rejected the 'immoral, unscrupulous, or unethical' test" and de-emphasized the focus on public policy.[43] It also added a requirement that the FTC consider both the costs and the benefits of a regulation and that the injury in question be "not reasonably . . . avoid[able]."[44]

Although the Policy Statement does not itself use the term "consumer sovereignty," the FTC continued to elaborate the substantial injury/consumer sovereignty theory over the course of the 1980s, and Congress codified it in 1994.[45] This process consolidated the modern standard, in which, in Beales's telling, "[t]he primary purpose of the Commission's modern unfairness authority continues to be to protect consumer sovereignty by attacking practices that impede consumers' ability to make informed choices."[46] Such an approach follows in the tradition that presumes markets work in consumers' interests, making regulation appropriate only when there is a clearly identifiable

---

38 *Id.*

39 *Id.*; *see* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374, 378–79 (revoking FTC authority to promulgate rules for children's advertising in current proceedings and cutting off the subsequent three years' funding for rulemaking concerning unfair acts or practices in commercial advertising).

40 Beales Speech, *supra* note 25.

41 *Id.*

42 *See id.*; *FTC Policy Statement on Unfairness*, FED. TRADE COMM'N (Dec. 17, 1980), https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness; Int'l Harvester Co., 104 F.T.C. 949 (1984), 1984 WL 565290, at *95–101 (appending the Policy Statement).

43 Beales Speech, *supra* note 25.

44 *See id.*

45 *See id.*; *see also* Federal Trade Commission Act Amendments of 1994, sec. 5, § 9, Pub. L. No. 103-312, 108 Stat. 1691, 1695 (codifying the modern unfairness test).

46 Beales Speech, *supra* note 25.

"market failure." Unlike the old focus on morality and public policy, this modern notion creates an "objective test" that prevents the FTC from acting recklessly or paternalistically.[47] The harms at issue must be identifiable detriments to consumers, and the Commission must also consider the benefits (if any) of the practice that causes those harms. Moreover, the FTC must not take regulatory action unless it can establish empirically that the regulation it has in mind will actually produce a net increase in consumer welfare when all costs and benefits are tallied. Even when there is a harm that could be corrected by regulation, goes this line of thinking, the FTC should generally defer to consumer choice and to market mechanisms. "Unwise consumer choices," such as driving fast cars or eating fast food, at best provide "a strong argument for consumer education, but not for law enforcement."[48]

### *B. Questioning the Received Wisdom*

Beales was articulating a way of understanding unfairness that is widely shared among scholars of consumer protection and of the FTC in particular. The basic structure of his narrative is commonly repeated, with variations, as a way to make sense of the modern meaning of "unfair acts and practices."[49] Once the FTC employed unbounded moralism, then it learned its lesson and adopted its modern nonpaternalistic focus on consumer choice and cost-benefit analysis. This modern focus on consumer sovereignty can be read right off of the modern test for unfairness: the substantial injury analysis first articulated in the letter to Senators Ford and Danforth. And the core example of premodern unfairness, on this way of thinking, is KidVid.

---

47 *See id.*

48 *Id.*

49 *See, e.g.*, Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1950–60 (2000); Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 969–71 (D.C. Cir. 1985); Tracy Westen, *Government Regulation of Food Marketing to Children: The Federal Trade Commission and the Kid-Vid Controversy*, 39 LOY. L.A. L. REV. 79, 79 (2006) (referring to KidVid as "a rulemaking proceeding subsequently called the most radical agency initiative ever conceived"). Beales provides a subtler account in his more extended treatment of the lessons of KidVid, but he claims that a "congressional response of this magnitude was not simply the result of skilled lobbying by politically well connected industries." J. HOWARD BEALES, III, DIR., BUREAU OF CONSUMER PROT., FED. TRADE COMM'N, ADVERTISING TO KIDS AND THE FTC: A REGULATORY RETROSPECTIVE THAT ADVISES THE PRESENT 8 (2004) [hereinafter BEALES, ADVERTISING TO KIDS AND THE FTC], https://www.ftc.gov/sites/default/files/documents/public_statements/advertising-kids-and-ftc-regulatory-retrospective-advises-present/040802adstokids.pdf. Chris Hoofnagle agrees that the standard story is the morality tale and that it fails to account for the political dynamics of the time. *See* CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 60–66, 131 (2016).

As with any official history, most of the elements of Beales's story correspond with verifiable facts. It is true that the FTC greatly increased its consumer protection efforts in the 1970s, that there was a big backlash that nearly stripped the FTC of its unfairness authority, and that the Unfairness Policy Statement that sets out the modern unfairness standard was drafted in response to this controversy.[50] But the lesson Beales draws from those facts depends on some important distortions and omissions. Far from a momentary whim of crusading bureaucrats, KidVid was a regulatory effort with widespread public support that was based on over a decade of study and consideration within multiple parts of the federal government.[51] Most of the regulations of the 1970s were not even based on the FTC's unfairness authority,[52] and those that were—the Credit Practices Rule, for instance, not to mention KidVid itself—were based on reams of evidence rather than empty moralism.[53] The Cigarette Rule's and the *Sperry & Hutchinson* Court's interpretation of the meaning of "unfair," far from novel, was consistent with past precedent and well supported by the legislative history.[54]

So, what is going on here? Our first hint is that the received wisdom has a structure common to many neoliberal stories about the regulatory state. Bureaucrats have an inflated sense of their own moral authority, seek to expand their own power, and, without proper discipline, fail to understand the decentralized wisdom of the market.[55] Our second hint is that Beales himself is an actor in this story. Trained in economics at the University of Chicago in the 1970s, where neoliberalism was being molded into fighting shape,[56] Beales

---

50 *See infra* Parts V and VI.

51 *See infra* Section IV.C.

52 *See infra* notes 295–97 and accompanying text.

53 *See, e.g.*, *Am. Fin. Servs. Ass'n*, 767 F.2d at 985–88 (approving the Credit Practices Rule and recognizing substantial record evidence to support a finding of unfairness); Harry & Bryant Co. v. FTC, 726 F.2d 993, 999 (4th Cir. 1984), *cert. denied*, 469 U.S. 820 (1984) (approving the Funeral Practices Rule, also based on unfairness authority and prepared during this era, and finding substantial record evidence to support a finding of unfairness).

54 *See infra* Section IV.A.

55 *See generally*, George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 10–18 (1971) (presenting the traditional theory for how the political decision process facilitates regulatory capture by industry); *see also* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1801 (2020) (discussing the "market tragedy" argument whereby "the state simply cannot be trusted to make substantive judgments about value and distribution" in the market). On neoliberalism generally, see David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1 (2014).

56 *Howard Beales*, GEO. WASH. UNIV., https://business.gwu.edu/howard-beales (last visited Mar. 15, 2021) (noting that Beales received his Ph.D. in Economics from the

worked as a staffer on the KidVid rulemaking immediately after graduating with a Ph.D., and joined the FTC more than two decades later in part to consolidate the much narrower vision of unfairness that he was recounting.

These are hints that Beales's story might be serving a purpose, that he is not a disinterested observer. If we want to get a full sense of the story—and of our narrator's role in it—we will have to reconsider not just the 1970s but the full history of the FTC's authority to root out unfairness in markets.

## II
## Unfairness Before UDAP

One cannot understand why a New Deal Congress amended section 5 of the Federal Trade Commission Act to give the FTC authority over "unfair or deceptive acts and practices" without understanding why a Progressive Congress gave it authority over "unfair methods of competition" in the first place.[57] The Federal Trade Commission Act was part of a decades-long struggle to develop institutional infrastructure at the national level to yoke the increasingly nationalized social provisioning process to collectively-arrived-at priorities: the "public interest."[58] The evolving set of political coalitions that waged this struggle—first Populist then Progressive—did so in part by borrowing legal standards ("restraint of trade," "non-discrimination," "common carrier," "just and reasonable prices," et al.) that common law courts had used to regulate markets at the local level before the disruptions

University of Chicago in 1978). On the role of the University of Chicago Law School in the neoliberal project, see *infra* Section V.A.

[57] Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717, 719 (1914) (empowering the FTC to prevent "unfair methods of competition" through regulation).

[58] Borrowing from the heterodox economist Fred Lee, I intentionally use the term "social provisioning process" where others would use "the economy." *See* Frederic S. Lee, Microeconomic Theory: A Heterodox Approach 1–3, 37–40 (Tae-Hee Jo ed., 2018) ("The social fabric affects the organization of economic activities delivering the goods and services that make the social activities possible: it gives this delivery mechanism or the social provisioning process its meaning and its value."). The term is meant to emphasize that the production and distribution of goods and services is not a distinct realm of activity subject to its own "laws," but rather an ongoing *process* inextricably embedded within socially constructed cultures and institutions with regard to both means and ends. Whereas "economy" reifies production and distribution, treating them as a "free-standing object" that can itself be doing well or badly, Timothy Mitchell, *Rethinking Economy*, 39 Geoforum 1116, 1116–17 (2008), "the social provisioning process" treats production and distribution as socially constructed all the way down; *see* Lee, *supra*, at 38 (classifying the means of production, types of labor, and technology as "social entities" and "hence [they] are not naturally but technically specified via the social joint-stock of knowledge to be combined together to produce goods and services – without the 'intervention' of the social joint-stock of knowledge there would be no production at all").

of the Second Industrial Revolution. "Unfair competition" was among these standards.[59]

In their original context, these standards were embedded within a "moral economy," a common sense shared among jurists and civilians alike that "the economy [was] inseparable from the basic institutions and public concerns of their daily lives. As such, it was held to the same rigorous controls and legal standards that governed all aspects of life" in a "well-regulated society."[60]

The Populist and Progressive coalitions that borrowed these standards from the past sought to construct an updated moral economy—this time enforced at the national level.[61] They were repudiating the ideology of *laissez faire* and of self-correcting markets, instead insisting that markets were constructed to serve collective interests and should be held accountable through political and legal institutions. But they were not attempting to simply turn back the clock. They repurposed common law concepts for a new context as part of an ongoing set of experiments in reimagining what a more democratic social provisioning process could look like.[62]

### *A. Common Law Roots: Moral Economy, Fair Dealing, and Unfair Competition*

"Moral economy" is a term that English historian E.P. Thompson introduced to refer to the relatively "consistent traditional view of social norms and obligations [pertaining to economic life], of the proper economic functions of several parties within the community."[63]

---

59 On the Populist and Progressive coalitions' use of moral economy concepts, see Sanjukta Paul, *Rethinking Judicial Supremacy in Antitrust*, 131 Yale L.J. (forthcoming 2021); William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* The Corporations and American Democracy 139–40 (Naomi Lamoreaux & William J. Novak, eds., 2017); William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 Yale J. on Regul. 721, 740–49 (2018); Nicholas Bagley, *Medicine as a Public Calling*, 114 Mich. L. Rev. 57, 71–79 (2015).

60 William J. Novak, The People's Welfare: Law & Regulation in Nineteenth-Century America 83, 87, 88, 90 (1996); *see id.* at 84–88 (arguing against the conception that the basic function of the legal system was used to encourage enterprise but rather that law and state "were the central creators of the notion of economy as a special sphere of social activity").

61 *See supra* note 60 and accompanying text.

62 *See* William J. Novak, *The Progressive Idea of Democratic Administration*, 167 U. Pa. L. Rev. 1823, 1831–47 (2019). Some of the most powerful of the theorists of democratic administration had an openly racist understanding of what democracy meant. *See* Thomas C. Leonard, Illiberal Reformers: Race, Eugenics, and American Economics in the Progressive Era, at xiii (2016).

63 E.P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, Past & Present, Feb. 1971, at 76, 79 [hereinafter Thompson, *Moral Economy*]; *see also* E.P. Thompson, The Making of the English Working Class 67–83 (1980 new ed.) (detailing eighteenth-century mobs and riots that, "legitimized by the old paternalistic

As William Novak has pointed out, in the eighteenth and nineteenth centuries "the word 'economy' meant something different" than it does to us today.[64] The term's Greek root—*oikonomia*—is comprised of two words: *Oikos*, the Greek term for "household" and *nemein*, for "management and dispensation."[65] Together, *oiko-nomia* (*oeconomia* in Latin) referred to household management.[66] "By the eighteenth century . . . the word was broadened to include any society ordered after the manner of a family or, similarly, the general administration of the concerns of a community with a view to orderly conduct and productiveness."[67] And the purpose of economy—*political* economy, *public* economy, *moral* economy—was securing the common wealth and ensuring that it was produced and distributed in accordance with public morals, which were indexed to customary practices as interpreted by those in power.[68]

One crucial part of traditional moral economy regimes was to force as many transactions as possible to take place within public markets and to impose detailed regulations on those markets in an attempt to standardize those transactions.[69] "In the context of the technologies of the time, characterized by the absence of standardization, by very little information and very ineffective methods of control, bargaining fitted into a system that aimed to contain it within the strictest of limits."[70] Walton Hamilton notes that one can trace the

---

moral economy," sought to impose popular prices as against those determined by the free market).

[64] Novak, *supra* note 60, at 86.

[65] Dotan Leshem, *Retrospectives: What Did the Ancient Greeks Mean by* Oikonomia*?*, 30 J. Econ. Persps. 225, 225 (2016).

[66] Novak, *supra* note 60, at 86–87. On the shift toward the modern form of "economy" in classical political economy, see David Singh Grewal, *The Political Theology of* Laissez-Faire*: From* Philia *to Self-Love in Commercial Society*, 17 Pol. Theology 417, 418–19 (2016).

[67] Novak, *supra* note 60, at 87.

[68] *See id.* at 86–88.

[69] *See, e.g.*, Thompson, *Moral Economy*, *supra* note 63, at 83 (describing the eighteenth-century "paternalist model"); Laurence Fontaine, The Moral Economy: Poverty, Credit, and Trust in Early Modern Europe 247–48 (2014); Bernard E. Harcourt, The Illusion of Free Markets: Punishment and the Myth of Natural Order 71 (2011) (discussing the "numbing detail and tedious repetition" of eighteenth-century public economy "policing" regulations in France). Though Roman law and Aristotelian theory provide a common language for European articulations of moral economy reasoning, moral economy logics (often referred to as logics of "gift exchange" and "reciprocity") can be found in many cultures that do not share this language. *See, e.g.*, James C. Scott, The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia 42–44 (1976) (discussing the normative social function of rules of reciprocity in Southeast Asia); David Graeber, Debt: The First 5,000 Years 165–210 (2011) (describing the essential role of honor and degradation in the political exchange of ancient and medieval civilizations).

[70] Fontaine, *supra* note 69, at 247.

public morality of "an open market, a fair price, an honest measure, and a quality good after the fashion of the day" back to English "folkways," which eventually became the foundation of the common law as it formed out of the rules established at frankpledges and fairs, among guilds and in the town ordinances they wrote.[71] These customs were carried over to the colonies, and, as Novak illustrates, "[n]early all state legislatures in the early nineteenth century passed laws directing 'trades to be conducted, and wares and goods to be fabricated, and put up for market in a certain manner.'"[72] Legislatures also enacted laws prohibiting nearly every business from being conducted without a license,[73] and laws requiring trade to be conducted only in public markets subject to rules for labeling, inspection, and fair dealing.[74] These laws were developed in a normative universe in which social roles and custom were relatively stable over time, a world in which a common notion of which conduct was proper from whom in which situation was widely shared, if not universally agreed upon or invariably followed. These were the customs into which individuals, communities, and legal systems were socialized.

Thompson notes that food rioters in eighteenth century England appealed to "selective reconstruction[s]" of these customs, "taking from [them] all those features which most favoured the poor and which offered a prospect of cheap corn [i.e., grain]."[75] Their "grievances operated within a popular consensus as to what were legitimate and what were illegitimate practices in marketing, milling, banking, etc."[76] They enforced customary prices—often taking grain from sellers in order to sell it and provide them a "fair" return.[77]

Similarly, the Populist coalition that created the first round of antitrust laws had been raised to understand commerce in terms of ancient notions of fair price and fair dealing, and they engaged in selective reconstructions of those concepts to impose some moral

---

71 Walton H. Hamilton, *The Ancient Maxim* Caveat Emptor, 40 YALE L.J. 1133, 1142–47 (1931) (providing examples of standards that resembled a "scheme of control [which] belonged rather to the close-knit neighborhood than to the more regular trafficking which came to be commerce"). For a detailed reconstruction of English folkways with respect to moral economy, see ROSAMOND FAITH, THE MORAL ECONOMY OF THE COUNTRYSIDE: ANGLO-SAXON TO ANGLO-NORMAN ENGLAND (2020).

72 NOVAK, *supra* note 60, at 88, 90–95 (quoting NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW vol. VI, at 749 (Boston, Cummings, Hilliard & Co. 1823)).

73 *Id.* at 88–90.

74 *Id.* at 88, 90–95 (quoting DANE, *supra* note 72, at 749).

75 Thompson, *Moral Economy*, *supra* note 63, at 98.

76 *Id.* at 79.

77 *See id.* at 83 (noting that millers and bakers were considered "servants of the community, working not for a profit but for a fair allowance").

order on the brave new world they were confronting.[78] Sanjukta Paul has shown that the drafters of the Sherman Act appropriated the concept of restraint of trade from the common law in large part to enact moral economy norms that allowed coordination among small producers (and workers) so long as it did not prevent others from practicing their trade or undermine the public regulation of trade.[79] William Boyd has shown that rate regulation has roots in that centerpiece of moral economy: the ancient doctrine of "just price" or "fair price" (*justum pretium*).[80]

It would be impossible to do any justice to the contested interpretations of the practice and logic of traditional moral economy regimes, but Boyd's analysis of the history of fair price can give a sense of the logic of fairness that undergirded moral economy and guided early antitrust thinking. The central concern of fair price jurisprudence has been, since the time of Aristotle, ensuring that prices reflect the "'common estimation' of the community" and/or some reference to the "real" value of the item (in terms of relative scarcity, of social importance, and other factors) rather than the ability of a given seller (or buyer) to exploit a bargaining partner.[81] In other words, and in congruence with republican political values, a market should be set up in a way that provides each member of a polity what they need to live a virtuous life in accordance with their social position, and prices should reflect the purpose of setting up the market (these needs of a community relative to its available resources) rather than the ability of a private will to extract from or impose its will upon the common-

---

78 *See* Paul, *supra* note 59.

79 *See id.* (arguing that common law market regulation is best understood in the context of traditional moral economy and that legislators did not intend to wholly abrogate those pre-existing principles in devising the Sherman Act).

80 William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. ON REGUL. 721, 750–69 (2018) (arguing that the idea of just price shaped the inquiry of how to regulate price in the public interest).

81 On Aristotle's role in the intellectual history of fair price, see, for example, *id.* at 731–33; James Gordley, *The Moral Foundations of Private Law*, 47 AM. J. JURIS. 1 (2002) (arguing in part that an Aristotelian foundation of commutative and distributive justice in various pricing contexts like contracted exchanges or tort liability provides a sounder explanation for those areas than typical twentieth-century economic analysis of law). On Aristotle as an interpreter of the moral intuitions common to precapitalist forms of social provisioning, see STEPHEN GUDEMAN, THE ANTHROPOLOGY OF ECONOMY: COMMUNITY, MARKET, AND CULTURE 60–63 (2001). On "common estimation of the community," see Boyd, *supra* note 80, at 733. On indexing prices to scarcity, see FONTAINE, *supra* note 69, at 247–50 (discussing the method of how modern Europe's bazaars estimated price). The key passages from Aristotle are in Books IV and V of the *Nicomachean Ethics*. *See* ARISTOTLE, THE NICOMACHEAN ETHICS 60–101 (Lesley Brown, ed., David Ross trans., Oxford Univ. Press 2009) (concerning "Moral Virtue" and "Justice," respectively).

wealth.[82] Fair price doctrine has been especially concerned with sales of necessities (especially grain), of goods with thin markets, and of goods and services between parties with highly unequal bargaining power—in contrast to sales on "normal" markets—because such sales make exploitation more likely.[83] The details of the doctrine have "varied over time and space, representing a pragmatic response to the demands of social order and stability," though, as already noted, fair price has generally been indexed to slow-moving customs about the substance and procedure of different types of commercial relationships.[84]

Fair *price* has long existed alongside notions of fair *dealing* in moral economy schemes.[85] As with fair price, norms of fair dealing have been oriented towards preventing businesses from taking advantage of their social position—with ensuring that the process of competition is controlled by the public rather than any private will.[86] Just as fair price can be understood in terms of ensuring that pairwise transactions reflect the common valuation of the community in which the transaction is embedded, fair dealing can be understood in terms of creating standards of conduct that ensure businesses only make money by serving the public interest. Some norms of fair dealing have been focused on the assurance of the quality and safety of products while others have been focused on ensuring that business is conducted honestly—that exchanges reflect the will of both parties rather than the ability of one party to get one over on the other.[87] The so-called "ancient maxim of *caveat emptor*"—which leaves all buyers to their own devices rather than enforcing norms of fairness—is, as Walton

---

82 This simplifies a highly complex and contested area of debate (both in the secondary and primary literatures): my purpose here is to demonstrate the basic intuitions of a moral economy in broad strokes.

83 Boyd, *supra* note 80, at 737–38.

84 *Id.* at 742.

85 *See id.* at 775 ("The idea of just price grew out of attempts to develop an ethical approach to economic exchange . . . ."); Hamilton, *supra* note 71, at 1152 ("The deceitful maker and the dishonest vendor were paraded through the streets with their fraudulent wares, exposed in the stocks with their false products burned beneath their feet . . . ."); Faith, *supra* note 71, at 94–95 (discussing signs of reliability in transactions as means for evaluating a fair deal); Fontaine, *supra* note 69, at 252 (noting, among other examples, how seventeenth-century regulators in Lyon tried to regulate transactions by prohibiting defective weights and measures and require the use of municipal weights).

86 Hamilton, *supra* note 71, at 1152 ("The records attest the dominance of the idea of solidarity. The welfare of the collect is always given first position. . . . [T]he good burgesses were to have equal chances to purchase in open market.").

87 *See* Novak, *supra* note 60, at 88–90 (providing examples of late seventeenth- and early eighteenth-century statutes); Hamilton, *supra* note 71, at 1149 ("But solicitude for the consumer did not stop at a direct regulation of quality; it found expression in a control almost as comprehensive as the range of industrial activity.").

Hamilton once demonstrated, an invention of the latter half of the nineteenth century.[88] The Latin expression is not to be found in the work of any "Roman author whose works survive," nor does it take on its modern meaning in the common law until the broad acceptance of *laissez-faire* individualism after the Civil War.[89]

Standards of fair dealing, long elaborated in detailed ordinances and guild rules,[90] became unsettled as guilds broke apart, regulations of public markets began to fade, and especially as trusts broke free of the state- and local-level regulatory schemes that would have once bound them.[91] Some standards of fair dealing became standards of "unfair competition" when competition was no longer regulated by guilds but by courts.[92] Indeed, the Continental equivalent of unfair competition law was elaborated rapidly over the century after the French Revolution abolished guilds and suddenly courts were confronted with tort actions between businesses.[93] Unfair competition developed more slowly and diffusely at common law, however.

A cause of action for "unfair competition" seems to have first made its way into U.S. common law at the beginning of the nineteenth century.[94] Its first—and still primary—use was to refer to actions for

---

88 Hamilton, *supra* note 71, at 1156–63, 1180–87 (finding no historical foundation for a legal doctrine of *caveat emptor* and arguing instead that it gained prominence as an application of a nineteenth-century judicial common sense which balanced the interests of business and justice). Morton Horwitz argues for a more complicated process of the emergence of the doctrine of *caveat emptor*, starting in some markets before others. *See* Morton J. Horwitz, The Transformation of American Law 1780–1860, at 58–62, 180–82, 198–99 (1977).

89 *See* Hamilton, *supra* note 71, at 1156–57, 1183–87 (discussing how *laissez-faire* transitioned from a common sense abstraction to a legal reality).

90 *See* Boyd, *supra* note 80, at 734 n.32.

91 On this process, see Alfred D. Chandler, Jr., The Visible Hand: The Managerial Revolution in American Business (1977) (focusing on the emergence of the modern, large enterprise in providing a "history of a business institution and a business class"); William G. Roy, Socializing Capital: The Rise of the Large Industrial Corporation in America 7 (1997) (reviewing the rise of "large-scale industrial corporation in America"); Paul, *supra* note 59, at 14–20 (discussing the rise of trusts).

92 *See* Milton Handler, *Unfair Competition*, 21 Iowa L. Rev. 175, 176–77 (1936) ("The guild regulations thus established norms of business behavior, not, as in modern times, in the guise of regulating competition, but rather in the form of a paternalistic, professional discipline."); Zechariah Chafee, Jr., *Unfair Competition*, 53 Harv. L. Rev. 1289, 1290–96 (1940) (discussing the eighteenth- and nineteenth-century use of "unfair competition" by the courts).

93 Walter J. Derenberg, *The Influence of the French Code Civil on the Modern Law of Unfair Competition*, 4 Am. J. Compar. L. 1, 2 (1955).

94 *See* Handler, *supra* note 92, at 182 (discussing the origin of the term "unfair competition"); Chafee, *supra* note 92, at 1294–96 (finding the origin of "unfair competition" in cases of improper imitation of trade names in the early nineteenth century); John Perry Miller, Unfair Competition: A Study in Criteria for the Control of Trade Practices 16 (1941) (same).

"passing off"[95] (or "palming off"[96]), in which one business designed or branded its products in a way that made them seem as if they were those of a competitor.[97] The idea, a novel one in a world in which trademarks were just beginning to be recognized by law (as opposed to guild practice), was that once a business had earned "goodwill" with its customers, it developed a quasi-proprietary interest in this goodwill.[98] Protecting this interest was meant to prevent businesses from free riding on others' reputations and to protect the buying public from deception and from shoddy products.[99] There was a connection between harm to competitors and to consumers. This meaning of the term "unfair competition" is still used to this day, now mostly in reference to the Lanham Act.[100]

In the early twentieth century, some U.S. courts and commentators began to use the phrase "unfair competition" more broadly, treating trade name and trade dress violations as examples of a more general type of business tort in which one firm improperly takes business away from another.[101] Protection of trade secrets began to be discussed as unfair competition jurisprudence, as did disparagement,

---

[95] MILLER, *supra* note 94, at 16.

[96] Handler, *supra* note 92, at 194.

[97] *See* sources cited *supra* note 94; *see also* Gilbert Holland Montague, *Unfair Methods of Competition*, 25 YALE L.J. 20, 24–29 (1915) (noting that some senators debating the meaning of the FTC Act approached this meaning of "unfair competition" drawing from common law at the time).

[98] *See* Handler, *supra* note 92, at 183, 190; Derenberg, *supra* note 93, at 4 (discussing the French concept of *achalandage*, a close counterpart to "good will" representing "the sum of all relations created between a business [] and [its] customers"); *see also* JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 17 (1959) ("[W]hile liberty of access to markets on the part of an owner is essential to the exchange-value of property, too much liberty of access on the part of would-be competitors is destructive of that exchange-value."). On the emergence of trademarks, see Chafee, *supra* note 92, at 1291–95. On the consumer protective role of brands in premodern regulation, see Gary Ricardson, *Brand Names Before the Industrial Revolution* (NBER, Working Paper No. 13,930, Apr. 2008).

[99] *See* Handler, *supra* note 92, at 183. For an excellent discussion of the values involved, see generally Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948).

[100] *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 4 cmt. b (AM. L. INST. 1995) (noting only two areas of federal law—the Lanham Act and the Uniform Deceptive Trade Practices Act—which prohibit such "passing off").

[101] *See* Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 413 (1916) ("[T]he common law of trade-marks is but a part of the broader law of unfair competition."); Int'l News Serv. v. Associated Press, 248 U.S. 215, 239 (1918) (finding, under federal common law, that an action for unfair competition may lie if one news agency uses the reporting of another news agency "to reap where it has not sown"); Handler, *supra* note 92, at 187–92 (discussing appropriation and the "new principle of unfair competition" announced in *International News Service*); Derenberg, *supra* note 93, at 6 (noting how *Hanover Star Milling Co. v. Metcalf* first expressed the theory that "the law of unfair competition was a genus rather than a species").

sabotage, bribery, and inducing breaches of contract.[102] It seemed possible that deception/misbranding claims (with an obvious consumer protection element) would be included until, in 1900, the Sixth Circuit declined to do so in *American Washboard Co. v. Saginaw Manufacturing Co.*[103] The highly influential panel of judges[104] reasoned that a business could only sue another for unfair competition if it could show that its property right (including in a trade name or other bit of goodwill) had been infringed.[105] When the FTC Act was being debated, it seemed possible to at least some observers that the concept would continue to expand in common law courts.[106]

---

102 *See* Handler, *supra* note 92, at 192–212 (discussing the foundations of various forms of competitive attacks); Derenberg, *supra* note 93, at 4–6 (discussing protection against disparagement, bribery, trade secrets, and similar practices in France and their comparatively slow adoption in the United States); MILLER, *supra* note 94, at 17 (noting the expansion of unfair competition to include trade secrets, bribery, various forms of misrepresentation, and any malicious interference); *see also* THOMAS C. BLAISDELL, JR., THE FEDERAL TRADE COMMISSION: AN EXPERIMENT IN THE CONTROL OF BUSINESS 22–23 (1932) (discussing 1916 FTC memo classifying sixteen different common law forms of "unlawful, unfair, or illegitimate competition" that included "[i]nducing breach of competitor's contracts," "[e]nticing employees from the services of competitors," "[b]etrayal of trade secrets," "[b]etrayal of confidential information," "[a]ppropriation of values created by a competitor's expenditures," "[d]efamation of competitors and disparagement of competitor's goods," "[m]isrepresentation by means other than words," "[m]isuse of testimonials," intimidation, obstruction, and "molestation of a competitor or his customers," "[e]xclusive dealing," "[b]ribery of employees," "[c]ompeting with the purchaser after the sale of business and goodwill," "[p]assing off the goods of one manufacturer or dealer as those of another," and "[c]onspiracies to injure competitors").

103 103 F. 281 (6th Cir. 1900); *see* Milton Handler, *False and Misleading Advertising*, 39 YALE L.J. 22, 35–39 (1929) (discussing the significance of *American Washboard*); GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 179–82 (1924) (same).

104 The panel was William Howard Taft, Horace Lurton, and William Day (with Day writing). *American Washboard*, 103 F. at 281. All three were eventually appointed to the Supreme Court and all were considered authorities on business law at the time. *See* Handler, *supra* note 103, at 35 (noting the importance of their prestige on the influence of the decision). Only two years before, Taft and Lurton (Taft writing) sat on the panel that decided *United States v. Addyston Pipe & Steel Co.*, in an opinion that was unanimously affirmed by the Supreme Court and that has become one of the most influential in antitrust jurisprudence. 85 F. 271, 278 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899); *see also* George Bittlingmayer, *Decreasing Average Cost and Competition: A New Look at the Addyston Pipe Case*, 25 J.L. & ECON. 201, 201 (1982) (discussing *Addyston*'s influence).

105 *American Washboard*, 103 F. at 285–86.

106 The peak of common law unfair competition doctrine was *International News Service v. Associated Press*, 248 U.S. 215 (1918). *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 531–32 (1935) (noting how *International News Service* extended the scope of unfair competition doctrine); Handler, *supra* note 92, at 190–92 (arguing that although some commentators initially thought unfair competition might extend broadly due to *Int'l News Serv.*, in retrospect that case was the peak); *see also* Ely-Norris Safe Co. v. Mosler Safe Co., 7 F.2d 603, 604 (2d Cir. 1925), *rev'd* 273 U.S. 132 (1927) (Judge Learned Hand's attempt to undermine *American Washboard*, reversed by the Supreme Court); Derenberg, *supra* note 93, at 20 (discussing the significance of *Mosler Safe* and

Even at its most expansive, the common law of unfair competition was not so much about preventing business consolidation as it was about ensuring that business competition was conducted virtuously: Drawing a line between proper and improper ways of attracting customers, enforcing norms pertaining to when an injury caused by competition is *mischief* and when it is *misfortune*.[107] At a more systemic level, "cutthroat" competition rewards ruthlessness, creating a dynamic where those willing to lie, cheat, and steal to make a buck gain greater and greater control over social provisioning while honest businesspeople seeking to do well by their customers are pushed out of the market or forced to compromise their values.[108] The result of competition of the wrong sort is a market where only the vicious can compete. Imposing standards of fair dealing ensures that competition is a virtuous rather than a vicious cycle.[109]

### *B. From Common Law to the Federal Trade Commission*

Despite its limits at common law, the phrase "unfair competition" had resonance for those seeking to impose norms of fairness on the few monopolists that had come to control—and extract massive profits from—the national economy at the turn of the twentieth century. Legislators representing different elements of the Populist coalition—farmers, artisans, small proprietors, organized urban wage laborers, etc.—had discussed the value of distinguishing "fair" from "unfair" competitive practices since before the passage of the

---

Judge Hand's "courageous effort"). Zechariah Chafee points out that *Erie* halted any possibility of further development of unfair competition doctrine, as it eliminated the possibility of developing federal common law in an era when nearly all trade was interstate. *See* Chafee, *supra* note 92, at 1299 (highlighting an *Erie* paradox where competition cases typically sitting in diversity would have to rely initially on undeveloped state law, foregoing the substantial body of now-forbidden, federal-judge-made competition law).

107 *Cf.* Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 McGill L.J. 91 (1995) (arguing that drawing the line between injuries that are the result of mischief and which are misfortunes is an inherently subject-independent normative exercise). *See also* Nicolas Cornell, *Competition Wrongs*, 129 Yale L.J. 2030 (2020) (extending New Private Law logics into competition regulation).

108 *See* Laura Phillips Sawyer, American Fair Trade: Proprietary Capitalism, Corporatism, and the "New Competition," 1890–1940, at 48, 56 (2018) (discussing the moral resonance of "cutthroat," "ruinous," and "excessive" competition).

109 On the potential logics of unfair competition, see Handler, *supra* note 92, at 179–82; Chafee, *supra* note 92, at 1306, 1317–21; Brown, *supra* note 99, at 1184–1205 (focusing on trade symbols and advertising); Ervin H. Pollack, *A Projection for the Revaluation of Unfair Competition*, 13 Ohio St. L.J. 187 (1952) (charting unfair competition law's objectives, theories of liability, potential internal conflicts, judicial process, and potential for codification).

Sherman Act.[110] In doing so, they, consciously or not, resuscitated the older tradition of fair dealing from which unfair competition had emerged.

That the trusts used unfair tactics to gain an advantage—leading to a world in which the trusts would run the economy in their interests—was a visceral truth to people whose lives and livelihoods were increasingly subject to the whims of Rockefeller, Carnegie, Gould, Morgan, and the other Robber Barons.[111] And the *fin de siècle* amalgamations did involve all sorts of dishonest, shady, and even violent practices that forced competitors to choose between selling themselves to a competitor and exiting the market (or becoming workers for the new dominant firms, thus "proletarianizing"). Standard Oil, for instance, achieved its dominance in part through "local price cutting and espionage, establish[ing] bogus independents, grant[ing] rebates to preferred customers and exact[ing] rebates and preferences from railroads."[112] The National Cash Register Company did so via "espionage, enticement of competitors' employees, manufacturing inferior imitations of competitors' products, threatening infringement suits in bad faith, maintaining bogus independents, inducing breach of contract, shadowing competitors' salesmen, circulating false reports of competitors' financial standing, selling competitors' products below cost, and labelling an exhibit of the machines of competitors as junk."[113] These methods were not "unfair competition" at common law, but they certainly seemed to be unfair methods of gaining an advantage to most people who observed, let alone experienced, them.

The idea of punishing these unfair tactics as a complementary approach to punishing restraints of trade came to the fore as it became clearer that the Sherman Act was not succeeding in the task Congress had given it: preventing consolidation.[114] The idea of empowering an administrative agency to do the punishing gained in

---

110 *See* Miller, *supra* note 94, at 26 (discussing an 1888 bill that would have defined "trust" in terms of "intent to obstruct or hinder fair competition"); Paul, *supra* note 59, at 20–27 (discussing the various constituencies who made up the "antimonopoly coalition").

111 *See* Sawyer, *supra* note 108, at 64–91 (discussing fair trade's origins generally and the belief of some monopolists like Carnegie who viewed consolidation as a natural and inevitable consequence of production incentives).

112 Handler, *supra* note 92, at 215 (citing Standard Oil Co. v. United States, 221 U.S. 1, 42, 43 (1910)).

113 *Id.* (citing Patterson v. United States, 222 F. 599 (6th Cir.), *cert. denied*, 238 U.S. 635 (1915)); *see also* William H.S. Stevens, Unfair Competition: A Study of Certain Practices with Some Reference to the Trust Problem in the United States of America 9 (1917) (listing common unfair methods that led to consolidation).

114 *See* Naomi R. Lamoreaux, The Great Merger Movement in American Business, 1895–1904 (2010) (showing how mergers increased during the first decade of the Sherman Act).

prominence as it became clearer that the Supreme Court was neither going to interpret the Sherman Act (as the Populists and Progressives wanted) nor develop clear rules for businesses to plan around (as businessmen wanted).[115] Though there was broad agreement on the importance of both of these ideas, the details were up for vigorous debate. The FTC that resulted represented a mishmash of views, fused together in the pressure of President Wilson's felt need to get a bill out before the 1914 midterms.[116]

The first person to float the possibility of creating a Federal Trade Commission was Theodore Roosevelt. When he was President, he used that name to refer to his idea to expand the Bureau of Corporations that Congress had created as part of the Department of Commerce and Labor in 1903 into the equivalent of the Interstate Commerce Commission for the whole national economy (up to and including regulating prices).[117] Such an agency would follow the approach suggested in the Bureau of Corporation's first annual report, throwing out old-fashioned "anti-trust" laws that "futilely sought to maintain 'a condition of competition'" in favor of more evolved "unfair-competition" laws that ensured the process of consolidation "would 'be attended by as little injustice as may be.'"[118]

Louis Brandeis articulated the main alternative vision. The core of his vision was the promotion of a relatively even distribution of power among independent producers with a stake in a collective commonwealth.[119] Virtuous rivalry between producers could enable privately interested behavior to serve the public interest, as classical political economy posited, but, if "[u]nchecked by moral restraint and public regulation," this rivalry was always at risk of descending into a vicious cycle of predation and corruption in which public markets served only the private interest of a powerful few.[120] The "regulated competition" he supported "required an administrative body to monitor nearly all business practices" for evidence of predation, to enable businesses to share information that would enable more efficient man-

---

115 *See* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1, 7–15 (2003) (describing the inconsistency and narrowness of the Court's early Sherman Act holdings); Henderson, *supra* note 103, at 16–17 (describing early twentieth century political and business motivations for demanding a more specific legislative interpretation of the Sherman Act).

116 On the pressure of midterms, see Winerman, *supra* note 115, at 62–63.

117 *Id.* at 17–19.

118 *Id.* at 19. *See also* Sawyer, *supra* note 108, at 128–29 (comparing Roosevelt's and Brandeis's vision for a federal trade commission).

119 *See* Winerman, *supra* note 115, at 32–38 (detailing the development and tenets of Brandeis's antitrust views); Sawyer, *supra* note 108, at 110–35 (same).

120 Gerald Berk, *Neither Markets nor Administration: Brandeis and the Antitrust Reforms of 1914*, 8 Stud. Am. Pol. Dev. 24, 32 (1994).

agement, to facilitate cooperation to prevent ruinous competition,[121] especially at the trough of the business cycle, and to create a "forum for redress" when one or more businesses engaged in unfair tactics.[122]

Woodrow Wilson won the presidency in 1912, in part by taking Brandeis's advice.[123] Wilson's views on antitrust were, however, less than consistent. Initially, he favored banning discrete practices and enforcing those bans with criminal penalties.[124] But when he accepted the Democratic nomination, he knew he needed to appeal to the agrarian Populists in the South and West and sought out Brandeis for advice as to how to translate this need into policy.[125]

Although Wilson did not have settled views on what made business practices unfair, he did have strong views on the proper nature of the administrative state. In considering the value of an FTC, Wilson—unlike both Brandeis and Roosevelt—denigrated unaccountable decisionmaking by experts.[126] Placing moral judgment within an administrative agency was, for Wilson, to create a space for the public to enact its will, consistent with his notion that "administration in the United States must remain sensitive at all points to public opinion."[127] As such, "[t]he ideal for us is a civil service cultured and self-sufficient

---

121 Which types of competition count as "ruinous" depend on the normative baseline of the beholder. Monopolists seeking to consolidate their control are likely to see any competitive threat as potentially "ruinous." Brandeis had a particular idea of how some competitive practices could undermine competitive market structures, based on the notion of how price wars could (and did) lead to a self-perpetuating cycle that led to market collapse. *See* Berk, *supra* note 120, at 32. The details of Brandeis's account (and other competing accounts) go well beyond the scope of this Article.

122 SAWYER, *supra* note 108, at 128–29. *See also* Winerman, *supra* note 115, at 37–38 (describing Brandeis's vision for a commission as "an administrative board of some kind . . . with fairly broad powers").

123 *See* SAWYER, *supra* note 108, at 127–35 (discussing Brandeis's role in advising Wilson); Winerman, *supra* note 115, at 43–48 (same); Berk, *supra* note 120, at 39, 52 (same).

124 *See* Winerman, *supra* note 115, at 42–43 (discussing how Wilson thought that mandating that trusts take care of people was paternalistic as compared to creating clear rules of conduct and encouraging personal responsibility).

125 *Id.* at 43–44. On Wilson's continued courting of business interests and the relation to certainty, see *id.* at 63.

126 *Id.* at 46 (discussing Wilson's distaste for rule by experts).

127 BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 74 (2019) (citing Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 217 (1887)); *see also* Winerman, *supra* note 115, at 46–47 (quoting Wilson's September 27, 1912 speech describing a commission as an "instrument of a free government" which would be "quickly responive to the opinions of the people"). *But see* HENDERSON, *supra* note 103, at 18 ("Any *decently equipped lawyer* can suggest to you statutes by which the whole business [of monopolization via unfair practices] can be stopped." (emphasis added) (quoting WOODROW WILSON, THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 172 (1913))).

enough to act with sense and vigor, and yet so intimately connected with popular thought, by means of election and constant public counsel, as to find arbitrariness or class spirit out of the question."[128]

When Congress started debating the matter, the Democrat-dominated House initially followed Wilson's pre-Brandeisian instinct to define clear wrongs and punish them criminally.[129] It soon became clear that defining a list of such wrongs was far from straightforward, given both disagreements among legislators and the likelihood that the list would quickly become obsolete given the inevitability of innovation in chicanery.[130] As the House debate closed, Wilson ally Raymond Stevens suggested enabling the FTC to ban "unfair or oppressive methods of competition" in addition to whichever list Congress came up with.[131] The idea had come from Wilson's adviser George Rublee, who, at Brandeis's suggestion (via a recommendation from Learned Hand), acted as the White House's agent in the drafting process.[132]

With Wilson's support, the starting point in Senate negotiations was Rublee's suggested ban on "unfair competition" and the FTC's authority defined in terms of policing "unfair methods of competition."[133] According to Rublee, these phrases came from the *Standard Oil* decision itself, which had cited the corporate behemoth's "unfair methods of competition" as a reason to presume the unreasonableness of the restraint of trade it had created.[134] He and many legislators saw "unfair competition" and "unfair methods of competition" as equivalent.[135] The latter formulation was adopted because members of both Chambers were worried that hostile courts would read "unfair competition" too narrowly given its association with a particular cause of action at common law.[136]

---

128 EMERSON, *supra* note 127, at 74 (citing Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 217 (1887)).

129 *See* Winerman, *supra* note 115, at 52–62 (detailing the early debate and development of the Clayton Act).

130 *See id.* at 55–58, 58 n.337 (describing legislators' disagreements with regards to individual provisions in a series of precursor bills dubbed the "Five Brothers" and noting Wilson's retreat from precise definitions due to the ambiguity created in areas not enumerated).

131 *Id.* at 62.

132 *See id.* at 63–67.

133 *Id.* at 68.

134 *See* George Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 PROC. ACAD. POL. SCI. N.Y.C. 114, 116 (1926).

135 *See id.* at 116.

136 *See id.* at 117–18 ("[T]here was no intention to cover merely deceptive or dishonest practices by the prohibition of unfair methods of competition."); Montague, *supra* note 97, at 39 (indicating that the change to "unfair methods of competition" was intended to prevent "the limitation of 'unfair competition' to passing off one's business or goods for

According to Rublee, whose views on the matter heavily influenced the Senate debate:

> Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper. Without the use of unfair methods no corporation can grow beyond the limits imposed upon it by the necessity of being as efficient as any competitor.[137]

Similarly, William Stevens, a political economist whose work was much quoted in the debates leading up to the FTC Act, declared "the essence of fair competition" to be "the preservation of the efficient and the destruction of the inefficient."[138] Wilson also sometimes talked as if the point of regulating unfair competition was to ensure that only efficient firms survived, whatever their size.[139]

Those trained in neoclassical economic theory—or "economics" as it generally refers to itself—might be tempted to read "efficiency" and think of Pareto optimality or Kaldor-Hicks (or perhaps some Marshallian notion of consumer surplus).[140] But that would be a mistake. Kaldor and Hicks would not introduce their notions for another two decades, and Pareto optimality had yet to become the standard for value, even among neoclassical theorists.[141] In any case, the sort of economics that influenced all of these figures was that of the institu-

---

another's"); Winerman, *supra* note 115, at 90 ("[T]hus, it was made clear that Section 5 was not limited to 'palming off' offenses.").

137 Winerman, *supra* note 115, at 67.

138 Stevens, *supra* note 113, at 7; *see also* William H.S. Stevens, *Unfair Competition: A Study of Certain Practices and Their Relation to the Trust Problems in the United States*, 29 Pol. Sci. Q. 282, 283 (1914) ("If there be a sound basis for competition, it lies in the preservation of the economically efficient and the destruction of the inefficient."); 51 Cong. Rec. 11,230–31, 12,145 (1914) (senators quoting Stevens); 51 Cong. Rec. 16,329–31 (1914) (Stevens speaking on the House floor).

139 Winerman, *supra* note 115, at 45 ("I am not jealous of any process of growth, no matter how huge the result, provided the result was obtained by the processes of growth which are processes of efficiency, of economy, of intelligence, and of invention.") (quoting Wilson's September 18, 1912 speech).

140 For a technical introduction to the concept of Pareto efficiency/optimality, see Andreu Mas-Colell, Michael D. Whinston & Jerry R. Green, Microeconomic Theory 825–29 (1995) (discussing Pareto frontiers and their role in social welfare functions); *Id.* at 549–50 (discussing the First Fundamental Theorem of Welfare Economics: that markets that are "perfect" in the neoclassical sense are always Pareto frontiers). Excellent intuitive definitions and comparisons of these concepts, paired with critiques, can be found in: Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 Hofstra L. Rev. 509 (1980); Daniel Hausman, Michael McPherson & Debra Satz, Economic Analysis, Moral Philosophy, and Public Policy 146–69 (3d ed. 2017).

141 The foundational papers and technical introductions to the idea of Kaldor-Hicks efficiency are Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 Econ. J. 549 (1939) and J.R. Hicks, *The Foundations of Welfare Economics*, 49 Econ. J. 696 (1939). For a sense of the contemporary intellectual terrain,

tionalists, who opposed emerging neoclassicism.[142] And, whether institutionalist or neoclassical, the context of the statements does not seem to refer to optimizing social welfare functions but rather producing more for less. Efficiency in Stevens's and Rublee's usage then seems to refer to the narrower notion of input-output efficiency, i.e., the highest possible output from a given amount of input.[143] On this way of thinking, unfair competition would be any way of gaining business or reducing a competitor's business that does not rely on producing/distributing the same good at lower cost (a combination of productive and operational efficiencies) or producing a superior good.[144]

Even with that qualification, though, those who voted for the FTC Act would surely not have endorsed the full conflation of fairness with efficiency that Williams, Rublee, and others sometimes seemed to call for. Brandeis, after all, was not the only promoter of "industrial liberty," and the congressional record abounds with the importance of "public morals" and of preventing "oppressive" and

---

see Barbara H. Fried, The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement 29–47 (1998).

[142] *See* William J. Novak, *Institutional Economics and the Progressive Movement for the Social Control of American Business*, 93 Bus. Hist. Rev. 665 (2019) (detailing the origins, main contributors, and development of institutional economists and Progressivism as centered on the development of a "theory of the 'social control' of business, the market, and modern capitalism" which served as a "social and evolutionary counterpoint to classical and neoclassical political economy"); *see also* Malcolm Rutherford, The Institutionalist Movement in American Economics, 1918–1947: Science and Social Control (2013) (discussing the way institutional economics came to be a mainstream methodology and was then displaced by Keynesian and neoclassical thought). The term "neoclassical" actually comes from an institutional economist—Thorstein Veblen—in the process of differentiating institutional, Marxist, and historical schools from the Marshallian framework and its Austrian cousin. Thorstein Veblen, *The Preconceptions of Economic Science—III*, 14 Q.J. Econ. 240, 261 (1900).

[143] *See* Stevens, *supra* note 113, at 6 ("The interests of society lie in the highest possible utility at the lowest possible cost. . . . To secure this result it is necessary that efficient units of organization shall be preserved; and . . . that inefficient units shall be destroyed."); Winerman, *supra* note 115, at 67 (noting Rublee's belief that "[f]air competition is competition which is successful through superior efficiency"). This notion of "efficiency" is more akin to what Alfred Chandler has in mind when arguing that consolidation of business over the nineteenth century increased operational and productive efficiencies. *See* Chandler, *supra* note 91 (tracing the history of administrative coordination and allocation in American business).

[144] As an editor at the *New York University Law Review* pointed out during editing, this characterization leaves open the question of whether expenditures on advertising can ever be fair. Because mass advertising was in its infancy, this question was not salient to these thinkers. As we will see, it will quickly become so. For an excellent discussion of how postwar economic theory approached the question of advertising, see Brown, *supra* note 99, at 1167–84.

"dishonest" conduct.[145] Gerard Henderson, writing in 1924, summarized:

> [T]he debates themselves suggest, what seems obvious from the text of the Act, that it was the Congressional intention to confer on the Commission, subject to court review, the duty of giving a detailed content to the general principle embodied in the phrase [unfair methods of competition], and to employ, in fulfilling this duty, not only the rules and precedents established by the courts at common law and under previous statutes, but the technique of reasoning by analogy and upon principle, with which jurists are familiar.[146]

More broadly, these debates suggest that Congress did not just have juristic reasoning in mind: The moral intuitions of businessmen and of nonspecialists—that is, the intuitions of members of the public—were also discussed as relevant.[147] Connecting the threads of moral economy, of common law development, and of the value of an expanded Interstate Commerce Commission, Senator Newlands argued that "it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination," as the ICC had long done.[148]

The final version of the FTC Act represented a mixed vision. As Laura Phillips Sawyer puts it, "Republican progressives [hewing more towards Roosevelt's vision] won a regulatory agency empowered to determine the limits of 'unfair competition' while Democratic populists [more of the Brandeisian school] weakened the agency's broad powers and ensured that it would act as an information-sharing body."[149] Its ambit was restricted to issuing cease and desist orders, which it then had to go to a court to enforce—thus requiring court review of all of its determinations. As such, the FTC stood in an ambiguous place, somewhere between imposing its interpretation of the meaning of "unfairness" on businesses and facilitating and supervising the process of businesses working out mutually acceptable rules for fair dealing.[150]

---

145 *See* Montague, *supra* note 97, at 24–29 (detailing the debate in the Senate regarding the Federal Trade Commission Act); Winerman, *supra* note 115, at 67–88 (same).

146 Henderson, *supra* note 103, at 36.

147 *See* Montague, *supra* note 97, at 23 ("Business men are just as potent in determining what unfair competition means as are the courts; the writers who make our literature, after observing the affairs of men, are just as influential in determining the meaning of unfair competition as are the courts.") (quoting Senator Cummins).

148 *Id.* at 20.

149 Sawyer, *supra* note 108, at 129–30.

150 The question of whether it was up to the FTC or the courts called upon to enforce FTC orders to determine the meaning of "unfair" was initially decided against the FTC (over Brandeis's vehement dissent). *See* FTC v. Gratz, 253 U.S. 421, 427 (1920) ("It is for the courts, not the commission, ultimately to determine as matter of law what [the words

Yet the result was not entirely ambiguous. A common concern among those who voted for the FTC Act was the need for an independent governmental agency that could collect information on how different industries worked, facilitate debate (in the agency and at Congress) over appropriate business conduct, and enforce the resulting standards.[151] The agency, like the ICC, would be "independent" in the technical sense that it would be headed by a bipartisan commission, with commissioners removable only for cause and serving a term of years.[152] In part this independence reflected a valuation of expertise, but perhaps more importantly it reflected the felt need to create a space of deliberation relatively insulated from short-term politics and especially from the ability of big business to hijack and/or capture processes meant to rein in their power.[153] It was also broadly agreed that efficient production and distribution were beneficial, but that they could not be the sole orientation of political economy.[154] Collective priorities had to be set through a deliberative process that involved some combination of experts and the nonexpert public, and in any case not left to the whims of the owners of capital. The social provisioning process could not be understood entirely in terms of what it produced and to whom the products were distributed. At least as relevant were the ways in which the social provisioning process ordered social relationships (between owner and worker, producer and jobber/wholesaler, retailer and consumer), and the knock-on effects of that ordering on the way people were able to live their lives and participate in political processes. In other words, the shared vision was of an independent agency that would deliberate over the interests relevant to various areas of commerce (including but not limited to

'unfair method of competition'] include."). *But see id.* at 436–37 (Brandeis & Clarke, JJ., dissenting) (arguing instead that Congress "left the determination [of unfairness] to the Commission"). However, the Supreme Court became more deferential as it became more liberal. *See* FTC v. R.F. Keppel & Bro., 291 U.S. 304, 309–10 (1934) ("[W]e cannot say that the Commission's jurisdiction extends only to those types of practices which happen to have been litigated before this Court."); FTC v. Cement Inst., 333 U.S. 683, 692–93 (1948) (holding that the FTC was envisioned and authorized to assist the courts "in the drafting of appropriate decrees in antitrust litigation" including matters that fall under the Sherman Act); FTC v. Brown Shoe Co., 384 U.S. 316, 320–22 (1966) (expressly overruling *Gratz* and adopting Brandeis's dissent).

151 *See* Winerman, *supra* note 115, at 68–88 (detailing the competing priorities and goals of various members of Congress in regard to the FTC).

152 *See* Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257 (discussing the definition and quasi-judicial nature of independent agencies).

153 *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010) (discussing the characteristics of independent agencies that encourage relative insulation as well as the role of expertise).

154 *See supra* notes 134–45 and accompanying text.

input-output efficiency) and to elaborate and enforce standards of conduct that best balanced those interests.

## III
## The Development of UDAP

### A. *Consumer Protection at the FTC Before Wheeler-Lea*

The FTC had been created by a "producerist" coalition. Consumer identity was in its infancy—what we would now think of as consumer movements had not yet achieved national political influence.[155] Although unfair behavior towards consumers was certainly considered, the new agency was designed primarily to do justice as between participants in the process of production and distribution.[156] Consumers would benefit indirectly to the extent that competition was kept honest—to the extent consumers' *goodwill* was earned—but their interests were not centered in the substance or the procedures of the FTC.

And yet the great majority of the FTC's early enforcement actions targeted consumer fraud. Five of the first ten FTC cases involved consumer misrepresentations, justified on the theory that manipulating consumer demand unfairly takes business away from competitors.[157] Myron W. Watkins found that ninety-one percent of the FTC's orders in 1931 focused on deception.[158] Thomas C. Blaisdell, Jr. found that, as of 1928, 427 of 856 total cease and desist

155 *See* Meg Jacobs, Pocketbook Politics: Economic Citizenship in Twentieth-Century America 15–92 (2005) (detailing the emergence of politicized consumer consciousness in response to the inflation of the early twentieth century); Lawrence B. Glickman, Buying Power: A History of Consumer Activism in America 155–88 (2009) (discussing consumer activism during the Progressive Era); *id.* at 191–92 (noting the novelty of powerful consumer movements in the 1930s).

156 *See* Rublee, *supra* note 134, at 117 ("I have tried to make clear in the first place that there was no intention to cover merely deceptive or dishonest practices by the prohibition of unfair methods of competition. Fraudulent practices belong in an altogether different category from monopolistic practices."); Montague, *supra* note 97, at 21, 28, 35 (discussing the importance of "check[ing] monopoly in the embryo" and like phrases).

157 *See* Telephone Interview with William E. Kovacic, Glob. Competition Professor of L. & Pol'y, Geo. Wash. L. Sch. (May 4, 2020) [hereinafter Kovacic Interview].

158 Hoofnagle, *supra* note 49, at 4 n.2. The rising number is likely traceable to the fact that the Commission took a pro-big-business turn in 1925, which reduced the portion of actions preventing business consolidation (without necessarily increasing the number of actions brought to protect consumers). Marc Winerman & William E. Kovacic, *The William Humphrey and Abram Myers Years: The FTC from 1825 to 1929*, 77 Antitrust L.J. 701 (2011). By 1925, an estimated seventy percent of the Commission's orders were directed against false and misleading advertising. 6 The Legislative History of the Federal Antitrust Laws and Related Statutes 4808 (Earl W. Kintner ed., 1983) [hereinafter 6 Antitrust Legislative History].

orders (i.e., nearly fifty percent) were related to misrepresentation.[159] Likely this focus was due to the fact that consumer fraud actions were relatively uncontroversial (one did not have to take a side on competing views about antitrust), relatively easy to prove, and something businesses had a strong incentive to report about their competitors.[160]

The Supreme Court quickly approved of including consumer fraud in the FTC's ambit in *FTC v. Gratz*, noting that practices were unfair if, among other things, they were "opposed to good morals because [they were] characterized by deception, bad faith, fraud or oppression."[161] The Court initially tended to restrict the FTC's authority to practices that had been found "unfair competition" at common law, but in *Winsted Hosiery* it went further and agreed with the FTC that "misbranded goods [that, e.g., advertise themselves as 'Merino wool' when only containing ten percent wool] attract customers by means of the fraud which they perpetrate, [and] trade is diverted from the producer of truthfully marked goods."[162] In fact, the Supreme Court—with Brandeis himself writing—went even further, finding the FTC could take action against misbranding even if all competitors within an industry engaged in it, because doing so would ensure that a hypothetical honest business would not have to engage in misbranding just to compete.[163] The clear implication was that the FTC was not bound by the proprietary reasoning in *American Washboard*: Harm to consumers mattered even if no actual competing firm could claim a property right in those consumers' goodwill.[164]

As the FTC began to expand its consumer protective wings, courts and commentators continued to be supportive—Rublee being a notable exception.[165] The Supreme Court's initial insistence—in *Gratz*, ironically—that it was for the Judicial and not the Executive branch to elaborate the meaning of "unfair" gave way to tenuous def-

159 Blaisdell, *supra* note 102, at 23–24.

160 William Kovacic mostly shares this assessment of the likely reasons. *See* Kovacic Interview, *supra* note 157.

161 FTC v. Gratz, 253 U.S. 421, 427 (1920).

162 FTC v. Winsted Hosiery Co., 258 U.S. 483, 493 (1922); *see also* Sears, Roebuck & Co. v. FTC, 258 F. 307, 311 (7th Cir. 1919) ("The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived.").

163 258 U.S. at 493–94.

164 *See* Henderson, *supra* note 103, at 179–80 (summarizing the *American Washboard* holding); Handler, *supra* note 92, at 192–96 (reviewing the historical status of false advertising and *American Washboard* in connection with common law conceptions of unfair competition).

165 Rublee, *supra* note 134, at 120 ("I am not yet convinced that the departure of the Commission from the original plan has been wise. . . . It has . . . performed useful service in stopping certain deceptive business practices, but I do not find that it has ever thrown much light on the dark places in anti-trust law.").

erence to the FTC as the composition of the Court tilted more Progressive.[166] In an influential Second Circuit opinion, Judge Learned Hand—who had been in regular contact with Rublee during the creation of the FTC Act and even penned an anonymous editorial extolling its virtues[167]—connected the moral economy of the common law to the emerging normativity of the modern administrative state when he described the FTC as being charged with "discover[ing] and mak[ing] explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."[168]

But doubts crept in when the Supreme Court ruled in 1931 that the FTC could only use its section 5 authority to police consumer-facing practices that had implications for competition.[169] *Raladam* involved a quack "obesity cure" that was not only ineffective but dangerous, and "the Commission ordered the respondent to cease and desist from representing that its preparation is a scientific method for treating obesity . . . unless accompanied by the statement that it cannot be taken safely except under medical advice and direction."[170] The Court reasoned that, because the FTC Act was primarily "to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain,"[171] if the FTC could not produce evidence that the harm to consumers was also harm to other businesses that might be competing for those consumers, the FTC could not act.[172]

Although *Raladam* is sometimes portrayed as a definitive case that made congressional action necessary if the FTC were to continue

---

[166] *See supra* note 150 and accompanying text.

[167] *See* HOOFNAGLE, *supra* note 49, at 70.

[168] FTC v. Standard Educ. Soc'y, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd*, 302 U.S. 112 (1937). Notably, Hand made this statement in the process of narrowing the FTC's consumer protection authority by finding that the consumer fraud alleged was too obviously false to be taken seriously by a reasonable consumer. *Id.* at 695. In reversing Hand's decision, Justice Black reasoned: "Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception." 302 U.S. at 116. I recognize that it is anachronistic to mention the case this early in the narrative, as it came after *Keppel*, but it is a pithy encapsulation of the going sentiment among Progressives. *See, e.g.*, HENDERSON, *supra* note 103, at 91–98 (exploring the foundational motivations behind the design of the FTC Act and the role of the Commission as an administrative legal body in terms of interpreting moral standards—similar to a court of equity).

[169] FTC v. Raladam Co., 283 U.S. 643 (1931) (holding that the "existence of competition" is a necessary fact to support FTC jurisdiction).

[170] *Id.* at 644, 646.

[171] *Id.* at 647 (quoting FTC v. Sinclair Refin. Co., 261 U.S. 463, 476 (1923)).

[172] *See* 283 U.S. at 652–54 (holding the FTC lacked jurisdiction due to a lack of evidence that potentially misleading advertisements injured any competitors).

to protect consumers, its effect was ambiguous at best. Since *Winsted Hosiery* was still good law, at least some lower courts had no trouble finding evidence of anti-competitive effects without direct evidence, reasoning that "[s]elling by the use of false and misleading statements necessarily injures or tends to injure petitioner's competitors."[173] Moreover, only three years later the Supreme Court reaffirmed *Winsted*, reasoning that "[a] method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt . . . involve[s] the kind of unfairness at which the [FTC Act] was aimed."[174] That case, *R.F. Keppel & Bro.*, even went beyond *Winsted*, since it involved a finding of harm to consumers without fraud or deception. Instead, *Keppel* involved advertising to children. More specifically, a sweepstakes campaign was found to have "exploit[ed] . . . children, who are unable to protect themselves" and thus "[was] met with condemnation throughout the community."[175] It is likely no coincidence that, in the same year *Keppel* was decided, the FTC introduced the notion that it had authority over so-called "unfair or deceptive acts or practices" in a report on chain stores.[176] This seems to be the first appearance of that phrase.

Nevertheless, *Raladam* did throw a wrench in the FTC's operations.[177] Although lower courts often ignored the requirement, it did

173 E. Griffiths Hughes, Inc. v. FTC, 77 F.2d 886, 888 (2d Cir. 1935). *See also* Electro Thermal Co. v. FTC, 91 F.2d 477, 480 (9th Cir. 1937) ("[D]irect evidence to the effect that petitioner's misleading advertising claims diverted any business from its competitors . . . is not required by the decision in the Raladam Case, and would in many cases be impossible to prove."); FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934) ("Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightly named, are diverted to others whose methods are less scrupulous."); FTC v. Army & Navy Trading Co., 88 F.2d 776, 778–79 (D.C. Cir. 1937) (finding that misrepresentation was unfair competition without inquiring into competitive impacts); Pep Boys-Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158, 160–61 (3d Cir. 1941) (discussing the cases that eroded *Raladam*).

174 FTC v. R.F. Keppel & Bro., 291 U.S. 304, 313 (1934).

175 *Id. Keppel* also played an important role in moving the court towards more deference to the FTC's determinations. *See id.* at 314 (describing the determinations of the Commission as "of weight" due to its expertise and intended Congressional purpose); *see also* FTC v. Cement Inst., 333 U.S. 683, 691–93 (1948) (citing *Keppel* for the principle of deferring to the FTC's judgment); FTC v. Brown Shoe Co., 384 U.S. 316, 320–22 (1966) (explicitly overruling *Gratz* and adopting Brandeis's dissent). *Sperry & Hutchinson* built on these precedents. *See supra* note 33 and accompanying text; *see also* discussion *infra* Section VI.A.

176 Miller, *supra* note 94, at 101.

177 *See id.* at 98 ("[T]he *Raladam* decision had implications which led inevitably to a challenging of the Commission's jurisdiction in cases of price fixing by voluntary agreement . . . ."); Neil W. Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 Geo. L.J. 225, 233 (1981) (indicating that *Raladam* "raised significant legal and administrative difficulties" for the Commission).

officially require the FTC to produce evidence on competitive effects, increasing administrative cost.[178] It also called into question whether the FTC could condemn an entire industry. It could not obviously be said of a particular patent medicine company that its meritless health claims forced competitors to lower their standards, since only those with meritless health claims (i.e., other patent medicine companies) were competitors. Perhaps more consequentially, *Raladam* was a reminder that ideologically opposed judges could still find ways to limit the FTC's authority, a reality that had been much clearer in antitrust enforcement.[179] And as movements for consumer protection gained momentum in the 1930s, officials at the FTC saw an opportunity to clarify its authority in the area.

### B. *Consumer Mobilization and the Creation of UDAP*

In the Progressive Era, the main focus of what we would now call "consumer protection" at the federal level[180] was on health and safety risks that increasingly consolidated companies were willing and able to offload onto an increasingly anonymous and ill-informed public. Muckraking journalism created public outcries that movement leaders channeled into legal reform. Most notably, the publication of Upton Sinclair's *The Jungle* in 1906 produced such a torrent of outrage that Congress created the Food and Drug Administration that same year.[181] Though there was an emerging consensus that cutting costs on

---

178 *See supra* note 173 (collecting cases in which lower courts discussed *Raladam*'s requirement but found ways to ignore them).

179 *E.g.*, FTC v. Eastman Kodak Co., 274 U.S. 619 (1927) (finding that the Commission did not have authority to order divestment of physical property even though section 7 of the Clayton Act seemed to explicitly contemplate that possibility). *See also* Kovacic Interview, *supra* note 157 (saying that the Court was "not [the FTC's] friend in this period," citing to fights over document demands, section 6, and section 9 in addition to section 5 interpretation cases discussed herein).

180 State-level price and usury controls carried over from older moral economy traditions and were often defended by Populists, especially agrarian populists who depended on high-risk loans. *See* LENDOL CALDER, FINANCING THE AMERICAN DREAM: A CULTURAL HISTORY OF CONSUMER CREDIT 112–23 (1999) (discussing the role of usury laws in the late nineteenth century and their moral economy origins); HORWITZ, *supra* note 88, at 237–45 (discussing controversy over usury laws in the second half of the nineteenth century as part of the repudiation of moral economy thinking); THOMAS HUDSON MCKEE, THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES 1789 TO 1905, at 251 (1906) (quoting the Union Labor Party platform: "The paramount issues to be solved in the interests of humanity are the abolition of usury, monopoly, and trusts . . . .").

181 *See* Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768; Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. ONLINE 179, 183–84 (2018), https://columbialawreview.org/content/the-lochnerized-first-amendment-and-the-fda-toward-a-more-democratic-political-economy (describing the origin of the Food and Drug

health and safety measures was not an acceptable form of increasing productive efficiency and that government had a role to play in preventing firms from competing on that margin, these early efforts stalled out as the Progressive movement dissolved in the acid of the "normalcy" politics surrounding World War I.[182] Just one bellwether: When the FTC released a scathing and detailed report on the meatpacking industry's profiteering during the war, the *New York Times* accused it of anti-American subversion and Congress stripped its jurisdiction over meatpackers.[183]

Over this same period of time, advertising practices became much more widespread and sophisticated. Many of the bureaucrats who were responsible for developing the first modern state propaganda machine to gin up support for America's entry into the Great War migrated to the corporate sector, bringing the lessons they learned to develop the modern practices of business propaganda.[184]

A growing chorus of social researchers raised the alarm, arguing that this new industry was taking advantage of consumers' vulnerabilities.[185] These concerns were often paired with worries about the tension between widespread business propaganda and the nurturing of critical thinking necessary for a free and democratic society. Even outside of Progressive circles—even, indeed, in the University of Chicago economics department—many agreed that consumers largely

---

Administration). As with the law of unfair competition and restraint of trade, Progressive lawyers attempted to channel concerns through common law courts as well. *Cf.* MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) (allowing a buyer of a car to sue its manufacturer, removing the previous "privity" limitation on tort suits). On the impact of this case on tort law, see Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1709–14 (2003).

182 *See* G. Cullom Davis, *The Transformation of the Federal Trade Commission, 1914–1929*, 49 MISS. VALLEY HIST. REV. 437, 440–46 (1962) (detailing the FTC's shift from progressive to conservative leadership and direction in 1925); JACOBS, *supra* note 155, at 72–73 (connecting fears of the First Red Scare with critiques of labor and the FTC); SAWYER, *supra* note 108, at 187–95 (describing the impact and influence of Hoover as Secretary of Commerce in the 1920s).

183 Davis, *supra* note 182, at 441 (indicating how Congress transferred jurisdiction over meatpackers from the FTC to the Department of Agriculture); *see also* JACOBS, *supra* note 155, at 72 (reporting that multiple senators who represented meatpacking interests charged the FTC "with treason and conspiracy"); HOOFNAGLE, *supra* note 49, at 23–24 (noting that even the *New York Times* characterized the FTC "as carrying on the 'propaganda of a class struggle,' and urging Congress to cure it of its 'Bolshevist and propagandist tendencies'").

184 *See* INGER L. STOLE, ADVERTISING ON TRIAL: CONSUMER ACTIVISM AND CORPORATE PUBLIC RELATIONS IN THE 1930s 13–16 (2005) (connecting WWI propaganda to the origins of public relations and the legitimization of advertising as an industry).

185 *See* JACOBS, *supra* note 155, at 99–103 (discussing several of the most influential social researchers who were raising consumer issues); STOLE, *supra* note 184, at 20–24 (same).

could not protect themselves against the overwhelming new powers of massive enterprises.[186]

Many of these concerns were expressed by newly organized consumers themselves. Over the 1920s, various strains of Progressive and socialist organizing began to focus on consumer interests as part of broader campaigns for increasing the power of the working and middle classes and, for some, to end racist practices.[187] The growing appetite for a consumer movement was evidenced by the increasing number of bestsellers that focused on how big business undermined consumers' interests. Stuart Chase's *The Tragedy of Waste*, published in 1925, and Chase and Frederick Schlink's *Your Money's Worth*, published in 1927, flew off the shelves. They were followed by Schlink and Albert Kallet's *100,000,000 Guinea Pigs* in 1933, and by M.C. Phillips's *Skin Deep* and James Rorty's *Our Master's Voice: Advertising* in 1934.[188] The scandalized began to join consumer organizations, including Schlink and Chase's own Consumers' Research, which quickly grew from an informal newsletter to the first nationwide product-testing and consumer advocacy organization.[189]

Both elite and folk worries about advantage-taking in mass society can be seen as updates to the traditional moral economy concern that exchanges reflect the public process of valuation rather than the manipulations of the powerful. If advertising was being used to manipulate desires and bamboozle the public, purchasing choices were more properly seen as reflecting the private interests of the propagandizing businesses rather than the free choices of well-informed individuals. If businesses could cut costs by offloading risks onto the public without being detected, they were engaged in just the sort of unfair dealing that had been prohibited in public markets since the early days of the common law.

---

186 *See* Niklas Olsen, *From Choice to Welfare: The Concept of the Consumer in the Chicago School of Economics*, 14 Mod. Intell. Hist. 507, 513–17 (2017) (focusing on Chicago school leader Henry C. Simons's portrayal of consumers as "vulnerable"). A 1938 *Printer's Ink* survey found that a majority of the economics profession held unflattering views of advertising. Stole, *supra* note 184, at 126.

187 Glickman, *supra* note 155, at 189–218 (examining the divisions within the consumer movement of the 1930s); Jacobs, *supra* note 155, at 122–35 (detailing the consumer movement in 1934 and 1935); Lizabeth Cohen, A Consumers' Republic: The Politics of Mass Consumption in Postwar America 36–56 (2003) (focusing on the mobilization of women and Black Americans as consumers).

188 *See* Stole, *supra* note 184, at 23–36 (describing the premise and history of the aforementioned texts); Jacobs, *supra* note 155, at 89–90, 103 (indicating the success of *Your Money's Worth* and *100,000,000 Guinea Pigs*); Glickman, *supra* note 155, at 192–200 (detailing the background and influence of various early consumer movement texts).

189 Glickman, *supra* note 155, at 189–205 (chronicling the rise of Consumers' Research); Stole, *supra* note 184, at 24–35 (same).

Consumer advocates (including Schlink, Kallet, Rorty, Caroline Ware, and Robert and Helen Lynd, among many others) had a voice in early New Deal efforts, including the Consumer Advisory Board (CAB) of the National Recovery Administration (NRA) (which, it should be noted, was focused on creating rules of "fair competition"),[190] the Agricultural Adjustment Administration (AAA), and, once World War II started, the Office of Price Administration (OPA).[191] Every consumer-focused institution in the New Deal state created publications on businesses (some of which provided detailed comparative price reports),[192] established local councils of consumers,[193] and granted consumers themselves varying degrees of enforcement authority.[194] Meg Jacobs points out that "[t]hese New Deal programs legitimized consumer activity and raised what Robert Lynd identified as a growing 'consumer consciousness.'"[195]

As Jacobs observes, many consumer representatives inside and outside government had become less inclined to "break up corporations" than to "organize[] consumers and a strong labor movement as necessary antidotes to corporate power."[196] Mass society and big business had come to seem more inevitable and decentralizing ownership and control over the productive process had come to seem less desirable as the living memory of nineteenth century proprietarian republicanism faded.[197] The nature of the Progressive coalition had changed.[198]

---

190 *See* National Industrial Recovery Act, Pub. L. No. 73-67, § 3(a), 48 Stat. 195, 196 (1933) ("Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof . . . .").

191 *See* JACOBS, *supra* note 155, at 104–18, 122–25 (describing the early New Deal's focus on consumers); *id.* at 179–204 (discussing consumers' role in the OPA); LANDON R.Y. STORRS, THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT 67–76 (2013) (discussing New Deal consumerism).

192 *See* JACOBS, *supra* note 155, at 124 ("Throughout the country, local councils became repositories for the AAA's *Consumers' Guide*, the NRA's *Consumer Notes*, and the Bureau of Home Economics' *Market Basket*.").

193 *See id.* at 123 (explaining the enforcement scheme of local consumer councils).

194 *See id.*

195 *Id.* at 124.

196 *Id.* at 100.

197 On proprietarian republicanism, see, for example, William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767 (1985) (outlining the basic republican frame in which multiple political tendencies understood the morality of work and corporate organization).

198 COHEN, *supra* note 187, at 24–25; *see also* ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 227–64 (Vintage Books 1996) (1995) (discussing the shift in focus of the Roosevelt Administration from structural controls to promoting consumer interests with the emergence of Keynesianism and a shift in the liberal coalition).

The journey to the UDAP standard began in earnest when Milton Handler—a professor of law at Columbia and New Deal statute drafter extraordinaire—connected with Schlink and Kallet to work on efforts to incorporate regulation of advertising practices into the Food and Drug Act.[199] Handler brought Rexford Tugwell—also from Columbia—into the discussions, and the resulting "Tugwell bill" was proposed by Senator Copeland in 1933.[200] The bill made misleading advertisements of food or drugs equivalent to misbranding—which would have enabled the Food and Drug Administration to remove the advertised products from the market—and included liability for the media companies that printed the ads.[201] In advocating for the bill, Tugwell made the fair competition argument that banning misleading practices "would be a boost to honest advertisers."[202]

Unsurprisingly, several business lobbies pushed back hard. They argued that consumers ought to be trusted to make rational decisions, referring to consumer mobilizations as the "so-called consumer movement" as they simultaneously organized their lobbies to create industry-funded "consumer organizations," in addition to developing self-regulatory approaches to point to the ability of the private sector to clean up its act.[203] But advertising regulation was not high on the Roosevelt Administration's priority list, and the President was not interested in picking that particular fight.[204]

As debate dragged on and consumer advocates lost more and more ground, FTC Chair Ewin Davis saw an opportunity. He proposed that the relevant authority be given to the FTC, which had less enforcement power and, Davis argued, could act like more of a neutral arbiter.[205] Davis proved an able lobbyist, and the bill that ultimately became the Wheeler-Lea Act moved quickly through the House.[206] Consumer protection forces got an extra boost when the

---

199 Stole, *supra* note 184, at 50–51.

200 *Id.* at 53. Copeland, interestingly, had been involved in a series of advertisements for Fleischmann's Yeast in which he, a doctor, vouched for the yeast's totally unproven health benefits. He was hostile to consumer advocates during many of the hearings for his own bill. *Id.* at 70, 72.

201 *Id.* at 54.

202 *Id.* at 57.

203 *Id.* at 106–36 (pointing out that Progressive reformers like Robert Lynd called advertisers out on their hypocrisy for privately thinking that consumers "were too shallow or too stupid to understand facts" but arguing the opposite publicly).

204 *See id.* at 142 ("Roosevelt refused to get involved. He determined that the issue was 'wholly a matter for the Senate' . . . .").

205 *Id.* at 69, 144–45, 148.

206 *Id.* at 151–52.

horrid side effects of two drugs—sulfanilamide and dinitrophenol—scandalized the country.[207]

Although there was some remaining controversy over whether the FTC should have authority over food and drug advertising, the creation of a ban on "unfair or deceptive acts and practices" was hardly even debated.[208] The language came from the FTC, and the FTC's views on the matter were treated as dispositive.[209] Congressman Mapes reflected the general sentiment in referring to UDAP as "a more or less procedural amendment about which there is no controversy."[210]

That UDAP was a "procedural amendment" did not mean it said nothing about the substance of the FTC's authority. As Senator Wheeler put it, the goal was to "make[] the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor."[211] Though there was some concern about specificity, as in the lead up to the FTC Act, attempts to write out a definition of "unfair" or an illustrative list of unfair practices all met with failure. The consensus was "that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible [for businesses] to invent others," initiating a game of whack-a-mole.[212] As in 1914, it was considered better to condemn unfairness in general

[207] *See* Hoofnagle, *supra* note 49, at 36.

[208] *See* Stole, *supra* note 184, at 148–50 (discussing the competition between the FTC and Food and Drug Administration); 83 Cong. Rec. 3255–56 (1938) (statement of Sen. Burton Wheeler) (discussing briefly the UDAP standard and observing a lack of serious objections), *reprinted in* 6 Antitrust Legislative History 4923–26.

[209] *See* 80 Cong. Rec. 6436 (1936) (statement of Sen. Burton Wheeler) ("This is a measure which was recommended by the Federal Trade Commission."), *reprinted in* 6 Antitrust Legislative History 4849; 80 Cong. Rec. 10679 (1936) (statement of Rep. Sam Rayburn) ("[T]here is nobody who has lobbied around this Capitol on any bill in the 23 years I have been in Congress more than the members of the Federal Trade Commission have lobbied on this bill, and I love the Federal Trade Commission."), *reprinted in* 6 Antitrust Legislative History 4860.

[210] 83 Cong. Rec. 393 (1938) (statement of Rep. Carl Mapes), *reprinted in* 6 Antitrust Legislative History 4899.

[211] 83 Cong. Rec. 3255 (1938) (statement of Sen. Burton Wheeler), *reprinted in* 6 Antitrust Legislative History 4924.

[212] S. Rep. No. 1705, at 2 (1936), *reprinted in* 6 Antitrust Legislative History 4845. The creation of UDAP was not *entirely* without controversy. There was some concern that enabling the FTC to penalize firms for (isolated or innovative) unfair *acts* as well as (ongoing) *practices* would deprive businesses of the right to be put on notice of where the boundary between fair and unfair was. Ultimately these worries were addressed by pointing out that the FTC had limited enforcement powers (even more limited than today's) and that it would have to sue in court before any liability would lie. Likely the first action the FTC would take would be to put businesses on notice and give it some time to respond, thus facilitating deliberation over rather than arbitrary designation of "unfair." *See* 6 Antitrust Legislative History 4813 (discussing how "acts" seem to imply that a

terms and leave it up to an administrative agency with expertise in business dealings plus a deliberative structure to work out the specifics.[213]

## IV
## Unfairness Activated

The acquisition of UDAP authority did not immediately change the FTC's pattern of enforcement.[214] In fact, it did not change the FTC's pattern of enforcement until the next upswell of consumer discontent twenty years later.

### *A. The Sixties and the Cigarette Rule*

Unlike other agencies in the New Deal, the FTC exhibited little initiative or creativity.[215] It was mostly staffed via patronage networks from the very beginning, and in the 1920s and 1930s it was staffed via patronage networks *and* pro-big-business ideologues like William Humphrey.[216] When Franklin Roosevelt tried to fire the intransigent Humphrey, the Supreme Court declared the action unlawful.[217] So Roosevelt turned his antitrust attentions to the Department of Justice—appointing the energetic and creative Thurman Arnold. Roosevelt then largely moved on to building out other, more powerful, agencies to enforce the public interest in markets.[218] In the early

single violation could be unlawful, while "methods" or "practices" seem to require an established pattern of violations).

213 Although the First Amendment's treatment of commercial speech is well beyond the scope of this article, it is worth noting that *Valentine v. Chrestensen*, 316 U.S. 52 (1942), was decided in 1942, clearing the way for potentially quite broad advertising regulation without constitutional problem. *Valentine* would be abrogated by, ironically, a case brought by Nader's Public Citizen: *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 758–60, 770 (1976).

214 *See* Hoofnagle, *supra* note 49, at 40 (starting in the 1940s, "the FTC busied itself with many activities that were not strategic or efficient uses of its resources," including industry guidance and irrelevant details).

215 Focusing just in the area of consumer protection, the NRA, AAA, and OPA were all engaged in more creative forms of consumer protection, notably involving consumers directly. *See supra* notes 190–91 and accompanying text.

216 *See* William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 Admin. L. Rev. 915, 930–31 (1997); Davis, *supra* note 182, at 445–49; Blaisdell, *supra* note 102, at 75–86.

217 *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Daniel A. Crane, *Debunking* Humphrey's Executor, 83 Geo. Wash. L. Rev. 1835, 1840–46 (2015) (describing the run-up to and meaning of the decision). This decision is still good law, but may not be for long. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2198–201, 2198 n.2 (2020) (discussing *Humphrey's Executor* with suspicion).

218 *See* Edward F. Cox, Robert C. Fellmeth & John E. Schulz, "The Nader Report" On the Federal Trade Commission 140–41 (1969) [hereinafter The Nader Report]; Kovacic Interview, *supra* note 157.

New Deal, the NRA was the center of energy for developing standards for fair competition.[219] During World War II, the OPA's price restrictions were the focus of consumer mobilization.[220]

In the Truman and Eisenhower eras, the postwar environment for consumer mobilization became bleak. Keynesian economic policy had created the conditions for unprecedented shared prosperity among a growing (mostly) white middle class, which de-radicalized many members of the working class and undermined the conditions for solidarity with broader working class and interracial coalitions.[221] When paired with a new and more virulent Red Scare, conformism, and respect for big business—a return to "normalcy," as in World War I—became the zeitgeist.[222]

For the consumer movement, this was not a mere matter of a diffuse change in the atmosphere. The House Un-American Activities Committee (HUAC) targeted multiple consumer advocates and multiple members of the federal bureaucracy working on consumer protection issues.[223] Indeed, the Dies Committee—the immediate predecessor to McCarthy's more famous incarnation of HUAC—was led by J.B. Matthews, a former executive at Consumers' Research who converted from being a "fellow traveler" of the Communist Party USA to a paranoid mix of anti-communism and anti-consumerism when the staff at Consumers' Research went on strike.[224] Consumer organizations that survived this persecution focused more on promoting smart consumption choices and less on checking the power of

219 *See* Jacobs, *supra* note 155, at 107–16, 123–25 (describing the NRA's extensive efforts); Sawyer, *supra* note 108, at 268–88 (outlining the NRA's early days); *see also* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 533–34 (1935) (discussing the relationship between the FTC's and the NRA's authorities over unfair competition).

220 *See* Jacobs, *supra* note 155, at 183–204 (discussing the OPA's operations and influence). Although the OPA maintained an eighty percent approval rating in the immediate aftermath of the war, *id.* at 219, 228, the meatpacking industry once again used its ability to coordinate political action to dismantle the regulatory agency. *Id.* at 225–31. *See generally* Meg Jacobs, *"How About Some Meat?": The Office of Price Administration, Consumption Politics, and State Building from the Bottom Up, 1941–46*, 84 J. Am. Hist. 910 (1997) (chronicling the rise and fall of the OPA). Its staff were targeted as "subversives" by conservatives—many were forced to quit due to unfounded allegations of spying for the Soviet Union. *See* Storrs, *supra* note 191, at 76–85.

221 *See* Cohen, *supra* note 187, at 192–287.

222 *Id.* at 124–27; Stole, *supra* note 184, at 159–60 (providing overview of the anti-Communist movement's goals); Storrs, *supra* note 191, at 76–85 (discussing the Red Scare).

223 Stole, *supra* note 184, at 159–60; Cohen, *supra* note 187, at 78.

224 *See* Storrs, *supra* note 191, at 54–56 (noting Matthews's belief that certain prominent consumer groups were "Communist fronts"); Stole, *supra* note 184, at 159–64 (describing Matthews's "claim[s] that Communists had infiltrated large segments of the U.S. consumer movement").

business.[225] Despite a "damning" report on the need to reform FTC appointments in 1949,[226] Eisenhower's FTC was not only ideologically pro-business and patronage-filled—it was outright corrupt. For example, Chair Edward F. Howrey was associated with a bribery scandal and actively maintained "an anti-antitrust lobbying practice" *during* his tenure.[227]

It was not until John F. Kennedy took office that the FTC began to think bigger about consumer protection. In part inspired by the muckraking journalism of Vance Packard, Kennedy had campaigned on a "Consumer Bill of Rights."[228] Having been advised to avoid patronage appointments in a report written by former Commissioner James Landis, Kennedy appointed Phil Elman, a former Justice Department litigator known for his civil rights work, as Chair.[229] He also appointed Mary Gardiner Jones, whose view of consumer society had been influenced by the anti-consumer-society views of Frankfurt School critical theorists.[230] In pursuit of moving the agency away from the reactive "mailbag approach"[231] to case selection and towards a forward-looking strategy, Elman pushed the FTC to create binding trade practice rules starting in 1962.[232]

Meanwhile, as in the 1900s and the 1930s, a series of widely publicized investigations into the health and safety risks of mass production awakened and motivated many previously complacent people, who put pressure on elected and appointed officials. 1962 was an important inflection point. In that year, an outcry over the horrifying birth defects caused by Thalidomide pressured Congress to give the Food and Drug Administration "substantially more extensive premarket review powers" and "a significant new role in overseeing the testing and promotion of medicines."[233] Rachel Carson arguably launched the modern environmentalist movement when she released *Silent*

---

225 *See* Stole, *supra* note 184, at 190–91 (describing how government pressure led to a shift from policy to product testing among various consumer organizations).

226 *See* Kovacic, *supra* note 216, at 932 (discussing the Hoover Commission's report and its lack of effect on the FTC).

227 Hoofnagle, *supra* note 49, at 88.

228 *See* Cohen, *supra* note 187, at 212–13, 298 (discussing Packard); *id.* at 341–47, 351–55 (discussing Kennedy and Packard's influence); Hoofnagle, *supra* note 49, at 41–42 (reproducing the Consumer Bill of Rights); David Vogel, Fluctuating Fortunes: The Political Power of Business in America 20–21 (1989); Richard A. Harris & Sidney M. Milkis, The Politics of Regulatory Change: A Tale of Two Agencies 155–56 (1989) (discussing Kennedy's pro-consumer approach).

229 *See* Kovacic, *supra* note 216, at 932 (describing the Landis report); Hoofnagle, *supra* note 49, at 41 (discussing Elman's background).

230 *See* Hoofnagle, *supra* note 49, at 41.

231 *Id.* at 104.

232 *Id.* at 43.

233 *See* Kapczynski, *supra* note 181, at 185–86; Vogel, *supra* note 228, at 28.

*Spring*, documenting the devastating effects of the pesticide DDT on plants, animals, and ecosystems in which it was used.[234] And mounting evidence of and concern about cigarettes' relationship to lung cancer, heart disease, and early death (including the freshly released blockbuster Royal College of Physicians of London report)[235] led President Kennedy to direct his Surgeon General Luther Terry to create a task force to study the issue.[236]

Terry released his report in 1964 to widespread shock.[237] Elman saw his opportunity to initiate the first consumer protection rulemaking at the FTC. With Richard Posner working as his assistant (before Posner took his turn to the right—which will become significant to the FTC later on), Elman was the primary author of the industry-wide "Cigarette Rule."[238] The Rule declared it an unfair or deceptive act or practice "to fail to disclose, clearly and prominently, in all advertising and on every pack, box, carton or other container in which cigarettes are sold to the consuming public that cigarette smoking is dangerous to health and may cause death from cancer and other diseases."[239] This rulemaking was the first major enforcement action in what would become a decades-long reconsideration of the role of cigarettes and cigarette advertising in American life that continues to resonate across multiple regulatory agencies and multiple levels of government.[240] And it relied on an unfairness rationale.

Although the FTC had traditionally not provided public reasons for its enforcement actions, the published regulation took the opportunity to elaborate on the meaning of the unfairness authority on which the FTC relied. It quoted Learned Hand's formulation about the "unexpressed standards of fair dealing which the conscience of the community may progressively develop,"[241] elaborating that section 5

---

234 *The Story of* Silent Spring, NRDC (Aug. 13, 2015), https://www.nrdc.org/stories/story-silent-spring.

235 COMM. TO REP. ON SMOKING & ATMOSPHERIC POLLUTION, ROYAL COLL. OF PHYSICIANS OF LONDON, SMOKING AND HEALTH: A REPORT OF THE ROYAL COLLEGE OF PHYSICIANS OF LONDON ON SMOKING IN RELATION TO CANCER OF THE LUNG AND OTHER DISEASES (1962), https://www.rcplondon.ac.uk/projects/outputs/smoking-and-health-1962.

236 Otis W. Brawley, Thomas J. Glynn, Fadlo R. Khuri, Richard C. Wender & John R. Seffrin, *The First Surgeon General's Report on Smoking and Health: The 50th Anniversary*, 64 CA: CANCER J. FOR CLINICIANS 5, 7 (2014).

237 *See id.* at 5 (discussing the report's release).

238 On Elman's and Posner's role, see HOOFNAGLE, *supra* note 49, at 43–44. In private conversation, Bill Kovacic has argued that Paul Rand Dixon played an underappreciated role in creating the Cigarette Rule, since the Rule could not have gone anywhere without Dixon's support. Kovacic Interview, *supra* note 157.

239 Cigarette Rule, 29 Fed. Reg. 8324, 8325 (July 2, 1964) (codified at 16 C.F.R. § 408.1).

240 Kovacic Interview, *supra* note 157.

241 Cigarette Rule, 29 Fed. Reg. at 8350 (quoting FTC v. Standard Educ. Soc'y, 86 F.2d 692, 696 (2d Cir. 1936)).

"bears much the same relation to the community's evolving standards of honest, fair and ethical conduct in business as the due process clause bears to the community standards of fairness and justice in government action."[242] (Elman's background as a constitutional litigator shines through here: He was, after all, responsible for the phrase "with all deliberate speed" that ended up in *Brown*).[243]

The FTC also articulated a nonexclusive list of the "factors that determine whether a particular act or practice should be forbidden" on the grounds that it was "unfair."[244] Although the factors it came up with were never presented as a test,[245] they were the most test-like thing the FTC had articulated up to that point. So, when the Supreme Court, in the 1972 *Sperry & Hutchinson* case, sought a summary of the FTC's unfairness authority in the process of approving of its breadth, it pointed to these three factors. The non-test had the best imprimatur one could ask for.[246] The "Cigarette Rule" was born.

Justice White's opinion in that case—written for a unanimous Court—justified the adoption of these factors by comparing the FTC to "a court of equity" in that it "considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[247] As with the Cigarette Rule itself, this was a restatement of the well-established Progressive notion of the role of the FTC and the courts' role in reviewing the FTC's actions. It was not an endorsement of some new notion of "unfairness."[248] But as unfairness jurisdiction expanded its reach, the importance of having something test-like and court-approved to refer to became more important. The adoption of "little FTC Acts" at the state level over the course of the 1960s and 1970s also helped reify these three factors into a "rule."[249] Those acts did not create state-level agencies, and so the role of interpreting the meaning of unfairness was left to courts, and courts have

242 Cigarette Rule, 29 Fed. Reg. at 8350.

243 *See* HOOFNAGLE, *supra* note 49, at 41.

244 Cigarette Rule, 29 Fed. Reg. at 8354–55.

245 *See id.* at 8355 (describing the factors as flexible).

246 *See* 405 U.S. 233, 244 n.5 (1972).

247 *Id.* at 244.

248 For a sense of where the state of this law was just before *Sperry & Hutchinson*, see *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367–68 (1965) (articulating the broadly deferential role courts were to play in reviewing Commission determinations about what counts as unfair).

249 *See* Dee Pridgen, *Wrecking Ball Disguised as Law Reform: ALEC's Model Act on Private Enforcement of Consumer Protection Statutes*, 39 N.Y.U. REV. L. & SOC. CHANGE 279, 281–91 (2015) (discussing the development of the "little FTC Acts"); Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 911, 912–19 (2016) (same).

been known to use multi-part tests as a way of operationalizing broad prohibitions.

The FTC was also buffeted by some of the upheavals of the 1960s, including those of the Black freedom struggle. In particular, the Watts Rebellion of 1965, which frequently targeted "ghetto lenders" and stores that took advantage of discrimination to charge high prices, inspired the Commission to open an experimental field office in Washington, D.C. to study how segregation enabled predatory business practices.[250] The research done by this small office would eventually become the basis for multiple enforcement actions, for the Credit Practices Rule (promulgated under the FTC's unfairness authority), for the Truth in Lending Act, for the reanimation of unconscionability doctrine (i.e., *Williams v. Walker-Thomas Furniture*), and multiple further research projects on the toll of segregation.[251] As with the Cigarette Rule, this office embodied the original idea of the FTC as an agency that seeks out potential moral problems with markets that can be debated and addressed by the FTC itself, other regulatory agencies, and Congress.

### *B. Third-Wave Consumerism Breaks the Dam*

The reforms of the first half of the 1960s were all relatively minor compared to what happened next. The scandals of the early 1960s and the skepticism of "big business" they engendered, mixed with a series of cultural, societal, and technological shifts to fertilize a new consumer movement, which Lizabeth Cohen has called "third-wave" consumerism.[252] Frequently with the direct or indirect leadership of Ralph Nader, membership-based and often membership-funded consumer advocacy groups tested out a series of strategies to create polit-

---

250 *See* Hoofnagle, *supra* note 49, at 44–47 (discussing the District of Columbia Consumer Program); Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor*,*"* 102 Geo. L.J. 1383, 1425–26 (2014) (describing the Watts Rebellion and efforts at confronting the practices of "ghetto merchants" in Washington, D.C. and elsewhere).

251 Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); *see also Report of the ABA Commission to Study the Federal Trade Commission*, 1 J. Reprints Antitrust L. & Econ. 885, 939 (1969) [hereinafter *ABA Commission Report*] (recounting the impact of this office as early as 1969); Fleming, *supra* note 250, at 1407–16 (describing the results of the FTC's D.C. study and the subsequent *Williams* litigation), 1427–32 (noting the influence of the FTC's D.C. study on the wave of subsequent consumer credit regulation).

252 Cohen, *supra* note 187, at 347, 355 ("third-wave consumer movement"); *see also* Harris & Milkis, *supra* note 228, at 155 (discussing consumerism in the 1960s); Vogel, *supra* note 228, at 103–05.

ical pressure in favor of consumer protection.[253] With the cloud of the Red Scare lifting and with a new generation disgusted at the conformism of postwar "normalcy," the halting efforts at holding businesses responsible took on new energy.

The mainstream of third-wave consumerists tended to be from the relatively prosperous midcentury middle class that had, both geographically and culturally, become increasingly separated from workers' movements, Black freedom struggles, and leftist political organizations.[254] They were skeptical of corporate power and the corruption it caused—and big business certainly felt threatened by their efforts—but they were not all that interested in restructuring control over production and frequently presented their arguments in terms of reinforcing market logic and enabling individual choice. In the mostly white mainstream of the movement, concerns for the "low-income consumer" and for racial discrimination were "focused more on liberal protection from the abuses of the marketplace than on the economic inequalities that made some people more capable of consuming than others."[255] In the white middle-class-led feminist movement, campaigns centered on forcing businesses to focus on a genderless ability to pay that left behind poor women and women of color.[256]

This describes the mainstream—the most powerful part—of the third-wave consumerist movement, but it oversimplifies. Consumer organizations were not univocal and they did not work alone. The valence of their political interventions depended in part on the coalitions that formed around them. Before the rise of third-wave consumerism, "trade unions had represented the most important organized opposition to business," including playing "a critical role in the enactment of consumer-protection legislation during the 1960s."[257] Unions and consumerists often worked together, even if they were sometimes at odds (over wage and price controls, for instance). The feminist and civil rights movements sometimes fought for expanded access to consumer markets—lunch counter sit-ins, were, for instance, fights for the ability to buy a meal on equal terms. The emerging New Left was deeply critical of consumer society and the "culture

---

253 On Nader's role, see, for example, MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 29–33 (1982); HARRIS & MILKIS, *supra* note 228, at 159–62; VOGEL, *supra* note 228, at 38–40.

254 COHEN, *supra* note 187, at 383; JACOBS, *supra* note 155, at 259.

255 COHEN, *supra* note 187, at 383.

256 *See* LOUIS HYMAN, DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK 204–05 (2011) (discussing Bella Abzug's position that credit discrimination was okay so long as it was based on willingness to pay, in contrast with the anti-poverty and Black freedom struggle movement's position).

257 VOGEL, *supra* note 228, at 137.

industry"—to use Frankfurt School theorists Max Horkheimer and Theodor Adorno's term.[258] In some sectors of the movement, this tendency manifested itself in campaigns to democratize access to mass communications, including repressing advertising and/or requiring counter-advertising.[259] Each of these movements had their own interpretation of the role of consumption in a democratic society, each of which carried with it an implicit understanding of the consumer's legitimate interest in various areas of life. Their influence waxed and waned depending on the moment and the area of regulation in question, the details of which go beyond the scope of our discussion here.

In addition to well-researched, morally clear, and politically sophisticated campaigning, the third-wave consumer movement benefited from a business community caught on the back foot,[260] from a Democratic wave election in 1964 that included many politicians who saw hay to be made in standing up for consumer protection,[261] and from a new generation of aggressive investigative journalists working for widely trusted journalistic outlets.[262] The Senate Commerce Committee of the 1950s had mostly been a prize for politicians as a way to gain support for their campaign funds by serving the interests of the businesses that appeared before it.[263] But by 1966, senators from both parties were elbowing for appointments with enough clout to enable them to get their name on bills that they could sell to voters as holding business responsible.[264] Senators like Warren Magnuson, Estes Kefauver, William Proxmire, Abraham Ribicoff, and Walter Mondale "were lawmakers who combined a real concern for con-

---

258 MAX HORKHEIMER & THEODOR W. ADORNO, *The Culture Industry: Enlightenment as Mass Deception*, *in* DIALECTIC OF ENLIGHTENMENT: PHILOSOPHICAL FRAGMENTS 94 (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., 2002).

259 *See* Telephone Interview with Tracy Westen, Former Deputy Dir. of Consumer Prot., FTC (May 7, 2020) (mentioning consumer "counter-commercials") [hereinafter Westen Interview]; Molly Niesen, Crisis of Consumerism: Advertising, Activism, and the Battle over the U.S. Federal Trade Commission, 1969–1980, at 63–65 (2013) (Ph.D. dissertation, University of Illinois at Urbana-Champaign) (on file with author) (discussing attacks on smoking advertisements).

260 VOGEL, *supra* note 228, at 38–40; LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE 55–56 (2015) (noting the changing relationship between consumers, businesses, and government in the 1960s); PERTSCHUK, *supra* note 253, at 16–17 (explaining the liberal-ness of lobbyists in the 1960s and their reduced inclination to press business's advantage as far as it could go).

261 *See* PERTSCHUK, *supra* note 253, at 15 (discussing the impact of the 1964 election and the growing influence of liberal lawmakers).

262 *Id.* at 23; VOGEL, *supra* note 228, at 54–56 (on the "new class"), 103–05 (on the idealism of young elites and the innovations of direct mail).

263 PERTSCHUK, *supra* note 253, at 8.

264 *Id.* at 20–21.

sumer exploitation with a shrewd awareness that they could use the media to market consumer issues to voters and thereby sell themselves to a broad public constituency."[265] Before the rise of Naderite/third-wave consumerist advocacy groups and independently minded journalists, politicians could pass toothless "consumer protection" laws with impressive titles, knowing that constituents wouldn't follow the details.[266] With a growing number of groups following the details, politicians could not get away with false advertising (as it were) so easily. Accordingly, elected officials hired "'entrepreneurial congressional staff' who tended to be liberal-minded idealists with a vaguely anti-business inclination, drawn to Washington to 'do good.'"[267] Michael Pertschuk's own journey to Chair of the FTC began as one of these staffers: Senator Magnuson's 1964 decision to change his image from that of a D.C. insider to that of a consumer advocate led him to hire Pertschuk out of law school.[268]

This wave of activism—and the evolving redefinitions of the public interest in consumer markets that went with it—slammed into the FTC in 1969.[269] The "Nader Report" portrayed the prevalence of businesses taking advantage of consumers, especially poor consumers, as a "crisis," and it portrayed the FTC as falling down on the job, both because of incompetence and because it was "engaged in active and continuing collusion with business interests—particularly big-business interests."[270] The authors of the report—recent graduates of elite law schools—were referred to as "Nader's Raiders."[271] But they were not entirely outsiders: They were given inside access to the inner workings of the FTC by Elman himself.[272] They largely adopted Elman's own views. For instance, the report singled out then-Chair Paul Rand Dixon, whom Elman hated (and who literally slammed his door on the Raiders),[273] for his chumminess with big business, his lack of interest in setting priorities, and his "well-known prejudice against 'Ivy League lawyers'" and in favor of "political and regional

---

265 Cohen, *supra* note 187, at 353.

266 Pertschuk, *supra* note 253, at 22.

267 Cohen, *supra* note 187, at 353; *see also* Pertschuk, *supra* note 253, at 23.

268 Pertschuk, *supra* note 253, at 24–26.

269 The Nader Report, *supra* note 218.

270 *Id.* at 11, 21, 29 (describing how big-business interests take advantage of consumers); *id.* at 39–76 (discussing the FTC's failures at detecting violations); *id.* at 121 (outlining collusion with big-business interests); *id.* at 151–57 (describing how poor hiring practices led to failures).

271 Niesen, *supra* note 259, at 65.

272 Hoofnagle, *supra* note 49, at 50–51; Niesen, *supra* note 259, at 65.

273 Niesen, *supra* note 259, at 65.

cronyism."[274] The report also held up the (Elman-initiated) cigarette advertising regulation as "indicative of what the FTC would be capable of if properly directed and motivated" and recommended a slew of reforms oriented towards increasing the power and responsiveness of the agency in addition to giving consumers a more direct say.[275]

With the increasingly powerful third wave of the consumer movement behind it, the impact of the Nader Report was felt almost immediately. As Congress began holding hearings, President Nixon commissioned the American Bar Association (ABA) to issue its own report.[276] Released later in 1969, the ABA report was only slightly less scathing than Nader's.[277] (There was a separate opinion, scathing in quite a different way, from the new neoliberal convert Richard Posner, on which more below.) Among other things, it repeatedly referred to the FTC as "fail[ing],"[278] affirmed the Nader Report's characterization of the Commission as incompetent, unmotivated, and captured,[279] and concurred with the assessment of the cigarette labeling rule as an exemplar of what an effective consumer protection agency could do.[280] It also held up the 1966 pilot program in Washington, D.C., wondering if the success of such a thinly staffed office could be multiplied if such task forces operated across the country, maybe even as permanent "community complaint board[s]" that could deputize citizens to monitor businesses for compliance with community standards of fair dealing as developed at the FTC and at the state level.[281] This speculation hearkened back to the Progressive and New Deal efforts to use the administrative state to empower local groups of consumers to act as enforcers and researchers (in the Office of Food Pricing, the AAA, and the OPA), democratizing the process of deliberation over moral economy.

After the ABA Commission legitimized the Nader Report's findings, President Nixon appointed Caspar Weinberger as Chair of the FTC and charged him with the mission of restructuring the agency to

---

274 THE NADER REPORT, *supra* note 218, at 37–39 (asserting the FTC's friendliness with big business); *id.* at 123–24, 141 (describing the FTC's disinterestedness and inability to set or understand priorities); *id.* at 151 (detailing Chairman Dixon's prejudice against Ivy-League lawyers); *id.* at 171 (proposing that the new FTC Chairman uproot cronyism).

275 *Id.* at 77, 161–73.

276 HOOFNAGLE, *supra* note 49, at 51.

277 *See ABA Commission Report*, *supra* note 251.

278 *E.g.*, *id.* at 891, 925.

279 *See id.* at 891, 899, 901, 918, 923, 925, 944 (describing the Commission's shortcomings).

280 *See id.* at 931 (referring to the Cigarette Rule as "innovative").

281 *Id.* at 939, 945–49, 945 n.91.

make it more effective at serving consumers' interests.[282] Working alongside Miles Kirkpatrick, a Nixon Republican who had chaired the ABA Commission, Weinberger fired a large portion of the existing staff and replaced them with younger attorneys with more elite pedigrees.[283] He also created the Office of Policy, Planning, and Evaluation, staffed primarily with economists, and, inspired by the Washington, D.C. office, revitalized regional offices, the latter of which accounted for ninety-nine percent of consumer redress by 1980.[284] Kirkpatrick took over as Chair of the revamped agency, appointing then-professor Robert Pitofksy—who had also worked on the ABA Commission—as Director of the Bureau of Consumer Protection.[285]

One early result of these efforts was the litigation that led to the *Sperry & Hutchinson* decision that lifted up the Cigarette Rule.[286] While that case is better classified as antitrust than consumer protection, it was notable because the FTC litigated a case up to the Supreme Court that confirmed, after decades of desuetude, that the FTC's unfairness authority could be put to work.[287]

More substantively, in 1972 the Commission passed down its decision in *Pfizer*.[288] In that case, the FTC concluded "that it is an unfair practice in violation of the Federal Trade Commission Act to make an affirmative product claim [in an advertisement] without a reasonable basis for making that claim."[289] The Commission, with then-Chair Kirkpatrick writing, reasoned that "[a]bsent a reasonable basis for a vendor's affirmative product claims, a consumer's ability to make an economically rational product choice, and a competitor's ability to compete on the basis of price, quality, service or convenience, are materially impaired and impeded."[290]

In reasoning in terms of "economic rationality" and the importance of fully informed decisions, Fitzpatrick was giving voice to the increasingly prevalent neoliberal conceptualization of consumer pro-

---

282 VOGEL, *supra* note 228, at 163; HARRIS & MILKIS, *supra* note 228, at 167. Weinberger was later indicted in the Iran-Contra Affair when serving in the Reagan Administration.

283 HARRIS & MILKIS, *supra* note 228, at 167.

284 *Id.* at 167–68.

285 Niesen, *supra* note 259, at 76–77; HOOFNAGLE, *supra* note 49, at 51.

286 FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972).

287 *See id.* at 244 & n.5 (discussing the FTC's unfairness authority).

288 Pfizer, Inc., 81 F.T.C. 23 (1972). This case was one of several that targeted advertising, much of which focused on expanding the concept of deception. *See*, *e.g.*, ITT Cont'l Baking Co. v. FTC, 532 F.2d 207 (2d Cir. 1976) (involving deceptive advertising of bread).

289 *Pfizer*, 81 F.T.C. at 62.

290 *Id.*

tection: one that focuses on ensuring consumer choice that is "rational" and "informed" but otherwise leaving "the market" to sort things out. As we will see, this way of thinking is usually grounded in one or another version of neoclassical welfare economics, which in turn is based on a rejection of the idea of making independent judgments about the "fairness" of a transaction or the "reasonability" of a decision. In a neoclassical framework, the only cognizable moral goal is allowing individual consumers to "maximize" their own idiosyncratic versions of "welfare"—relegating consumer protection regulation to creating a "neutral" market space where such "economically rational" behavior can take place independently of any "paternalistic" judgments about what counts as "fair dealing."[291]

Yet Fitzpatrick also drew upon the thick moral language of previous FTC practice, itself inherited from moral economy traditions. He wrote that "[t]he consumer is entitled, as a matter of marketplace fairness, to rely upon the manufacturer to have a 'reasonable basis' for making performance claims. A consumer should not be compelled to enter into an economic gamble to determine whether a product will or will not perform as represented."[292] And the test was articulated in terms of what a "reasonable and prudent businessman" would do.[293] These are articulations of inherently moral notions about appropriate standards of conduct based on what is "reasonable" to expect of businesses and consumers independent of their subjective notions of welfare. They are standards of *fair dealing*.

*Pfizer* remains good law and has provided the starting point for the FTC's ongoing program of requiring factual claims in advertisements to be substantiated.[294] Its unresolved tensions would only grow in the intervening years.

By 1977, the FTC had no fewer than seventeen consumer protection rulemakings ongoing, along with multiple other enforcement initiatives and research projects.[295] Unfairness played an increasing, though not a dominant, role. It served as the primary source of justification for the Credit Practices Rulemaking that had been initiated as a result of the extensive body of research on the practices of so-called "ghetto lenders" and "ghetto merchants" and would become the basis

---

291 *See* discussion *infra* notes 354–58 and accompanying text.

292 *Pfizer*, 81 F.T.C. at 62.

293 *Id.* at 64.

294 *See* Hoofnagle, *supra* note 49, at 134–38; *FTC Policy Statement Regarding Advertising Substantiation*, Fed. Trade Comm'n (Nov. 23, 1984), https://www.ftc.gov/public-statements/1984/11/ftc-policy-statement-regarding-advertising-substantiation; Thompson Med. Co., 104 F.T.C. 648, 839 (1984) (appending FTC Policy Statement), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

295 Vogel, *supra* note 228, at 163–64.

for much modern collection regulation.[296] Congress continued to egg the FTC on, holding hearing after hearing to ask Commissioners why they were not moving faster in passing and enforcing consumer protection regulation.[297]

The groundwork had been laid, and the continued strength of the consumer movement pushed the effort further. When elected alongside a landslide of Democrats, Carter consulted with Nader himself to determine who to appoint to head the FTC.[298] When Pertschuk took office in 1977, it seemed to most the FTC was finally coming into its own as a robust, popular, and creative consumer protection agency.[299]

### *C. KidVid, Part 1*

In 1978, the FTC initiated its now-notorious Children's Advertising Rulemaking.[300] Far from a whim or power grab from Pertschuk, the rulemaking grew out of a decade's worth of an overlapping set of efforts from consumer and public health advocates focused on advertising to children and the alarming evidence of the health effects of eating too much sugar. Members of Congress had repeatedly requested that the FTC take action, and Carter had expressed his support for the proceedings. The parallels with the rulemaking on cigarette advertising—an emerging body of scholarship on health risks that generated public outcry, a concern about the role of advertising in interfering with rational decisionmaking, a consideration of both deception and unfairness justifications—is hard to miss.

Criticisms of advertising to children should also be seen in light of the then-growing reconsideration of the role of advertising in general. The notion that advertising is anti-competitive, a waste of resources, or actively harmful to the identity formation of individuals had

[296] *See generally* Trade Regulation Rule; Credit Practices, 49 Fed. Reg. 7740 (Mar. 1, 1984) (codified at 16 C.F.R. § 444.1-.5 (2019)); *Am. Fin. Servs. Ass'n*, 767 F.2d at 965–67 (discussing the process that led to the rule and evaluating it under an unfairness rationale).

[297] *See Oversight Hearings into the Federal Trade Commission—Bureau of Consumer Protection (Delays in Rulemaking—Regulation of Advertising): Hearings Before the Subcomm. on Com., Consumer, & Monetary Affs. of the H. Comm. on Gov't Operations*, 94th Cong. (1976) [hereinafter *Oversight Hearings on Delays in Rulemaking in Advertising*]; *Federal Trade Commission Amendments of 1977 and Oversight Hearings: Hearings on H.R. 3816, H.R. 1767, & H.R. 2483 Before the Subcomm. on Consumer Prot. & Fin. of the H. Comm. on Interstate & Foreign Com.*, 95th Cong. (1977).

[298] Niesen, *supra* note 259, at 188. *See also* Harris & Milkis, *supra* note 228, at 170, 178–79 (discussing the emphasis on public interest lawyering the FTC adopted as part of its recruiting).

[299] Pertschuk was actually the moderate choice: Bella Abzug was rejected as too radical. *See* Niesen, *supra* note 259, at 188.

[300] Children's Advertising: Proposed Trade Regulation Rulemaking and Public Hearing, 43 Fed. Reg. 17,967 (proposed Apr. 27, 1978).

become increasingly mainstream over the course of the 1950s, 1960s, and 1970s.[301] Concerns about advertising to children in particular took on increased urgency in the latter half of the 1960s. Advertising ramped up (revenues increased five percent a year in the first half of the 1960s) and children's advertising in particular had become more sophisticated.[302]

Inchoate worries among parents took on political potency with the rise of the third-wave consumerism. Action for Children's Television (ACT), was founded in 1968, and grew rapidly.[303] Originally, ACT and its allies focused on demanding more educational programming and targeted the Federal Communications Commission. It quickly expanded to advertising. In 1971, the FCC, acting on a petition from ACT, "instituted a wide-ranging inquiry into children's programming and advertising practices."[304] It received an "overwhelming" response from "[m]ore than 100,000 citizens" almost entirely "express[ing] strong support" for ACT's basic proposal to require more ad-free children's programming.[305]

These public inquiries into the value of children's advertising took place at the same time as support for regulating advertising more broadly grew. By 1971, "[a]dvertising was so unpopular that the U.S. Chamber of Commerce distanced itself from the industry."[306] To follow the thread of the Cigarette Rule in particular: Cigarette advertising attracted further scrutiny at the FCC, the FTC, and in Congress—resulting in a legislative ban on television advertising for smoking. The industry agreed to this ban when faced with the threat of having to air counter-advertising on the health effects of smoking under the FCC's fairness doctrine.[307]

Faced with clear threats to their profits, the members of the National Association of Broadcasters tightened up their self-regulatory rules, including "requir[ing] that advertisements for break-

---

301 *See* Niesen, *supra* note 259, at 58.

302 *See* Cohen, *supra* note 187, at 320; Niesen, *supra* note 259, at 39.

303 Niesen, *supra* note 259, at 49.

304 Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship & Com. Content in Children's Programing & the Establishment of a Weekly 14-Hour Quota of Children's Television Programs, 50 F.C.C.2d 1, 1 (1974) (citing Petition of Action for Children's Television (ACT) for Rulemaking Looking Toward the Elimination of Sponsorship & Com. Content in Children's Programing & the Establishment of a Weekly 14 Hour Quota of Children's Television Programs, 28 F.C.C.2d 368, 368 (1971)).

305 50 F.C.C.2d at 2 (commenting on overwhelming response); Action for Children's Television v. F.C.C., 564 F.2d 458, 462 (D.C. Cir. 1977) (describing volume of citizen submissions).

306 Niesen, *supra* note 259, at 102.

307 *Id.* at 63–64.

fast cereals emphasize the importance of a balanced diet, that no advertisement encourage children to ingest immoderate amounts of candy and snack foods, and that children not be directly encouraged to pressure their parents into buying advertised products."[308] Over the course of this decade, Congress also held hearings and considered but did not adopt bills to address the matter.[309] Meanwhile, multiple studies were conducted and the field of child psychology continued to develop, providing increasing evidence of the ability of advertisers to manipulate children.[310] This effort at self-regulation successfully quelled FCC regulatory initiative.[311]

Over the same period of time, growing evidence of children's (and adults') inadequate nutrition caused growing concern. The Senate Select Committee on Nutrition and Human Needs was formed in 1968, initially as a result of the outcry generated by a CBS report titled *Hunger in America*.[312] The Committee quickly extended the scope of its authority to explore the state of the art in nutrition research and how public policy might aid public health. Hearings included extensive testimony from Robert Choate—Nixon-appointed Director of the Department of Health, Education, and Welfare—about the fact that there was an inverse relationship between cereals' advertising expenditures and nutritional content.[313] It was this Committee's influence that led to the White House Conference on Food, Nutrition, and Health in 1969 with a similar ambit.[314] A growing body of research on the effects of sugar on various aspects of health, and especially its role in causing cavities, was considered by both bodies.[315] Research also made clear that the plurality of advertisements to children were selling sugary cereals and other food with low nutritional value.[316] After nearly a decade of hearings, research, and deliberation, the Senate Select Committee released *Dietary Goals for*

---

308 *Action for Children's Television*, 564 F.2d at 464; *see also* Niesen, *supra* note 259, at 92 ("As soon as the possibility of hearings were announced, the advertising industry formed a top-secret joint taskforce."); *Id.* at 106–08 (on self-regulation).

309 *Broadcast Advertising and Children: Hearings Before the Subcomm. on Commc'ns of the H. Comm. on Interstate & Foreign Com.*, 94th Cong. (1975); *Oversight Hearings on Delays in Rulemaking in Advertising*, *supra* note 297.

310 *See, e.g.*, RICHARD P. ADLER ET AL., NAT'L SCI. FOUND., RESEARCH ON THE EFFECTS OF TELEVISION ADVERTISING ON CHILDREN: A REVIEW OF THE LITERATURE AND RECOMMENDATIONS FOR FUTURE RESEARCH 1 (1977) (summarizing "the present state of knowledge about the effects of television advertising on children").

311 *See Action for Children's Television*, 564 F.2d at 467–68.

312 MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH 38 (2002).

313 Niesen, *supra* note 259, at 89–91.

314 *See* NESTLE, *supra* note 312, at 38.

315 *See id.* at 40–41.

316 *See* Niesen, *supra* note 259, at 214–15.

*the United States*, which, among other things, highlighted the health problems associated with high sugar intake.[317] The Surgeon General's office began work on a report that would have similar recommendations that was eventually released in 1979.[318]

As evidence and momentum built, ACT and the Center for Science in the Public Interest both petitioned the FTC for a rulemaking on advertising to children generally and advertising of sugary cereals in particular.[319]

This was not the first effort to bring the FTC into the fray. In 1972, the FTC held five weeks of informational hearings on children's advertising, and staff concluded further study was needed and warranted.[320] In 1974, its Commissioners "voted unanimously to ban references to 'a premium, such as a prize, toy, game, or other promotional device having significant appeal for children under 12 years of age and unrelated to the merits of the product or service being promoted.'"[321] These efforts did not satisfy ACT or the consumer movement more broadly, nor did they seem to meet the public mood, which had grown increasingly skeptical towards big business and advertising.[322]

Accordingly, regulation of children's advertising was high on Pertschuk's priority list. He plucked his top consumer protection lieutenants directly out of the movements that pushed for more public control over advertising. Director of Consumer Protection Al Kramer had no previous experience with the FTC but had spent a good deal of time petitioning the FCC. He had actually accompanied the head of ACT, Peggy Charren, as she hand-delivered the original petition to regulate children's advertising in 1971.[323] Deputy Director Tracy Westen also had deep connections in the public interest lawyering scene and had ample experience pushing the FCC to democratize

---

317 NESTLE, *supra* note 312, at 40.

318 *Id.* at 43.

319 Children's Advertising: Proposed Trade Regulation Rulemaking and Public Hearing, 43 Fed. Reg. 17,967, 17,968 (proposed Apr. 27, 1978). Consumers Union filed a supporting petition later on. *See* FED. TRADE COMM'N, CHILDREN'S ADVERTISING: FTC FINAL STAFF REPORT AND RECOMMENDATION 10 (1981) [hereinafter FTC 1981 STAFF REPORT].

320 FTC 1981 STAFF REPORT, *supra* note 319, at 7; HOOFNAGLE, *supra* note 49, at 60.

321 Niesen, *supra* note 259, at 129 (quoting Joel Dreyfuss, *Restricting Advertising on Children's TV*, WASH. POST, June 28, 1974, at B1).

322 *See* JEFFERSON COWIE, STAYIN' ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS 70–71 (2010) (discussing the working-class insurgencies of the first half of the 1970s); Niesen, *supra* note 259, at 50–72 (discussing the growing skepticism of advertising and movement to regulate it).

323 Telephone Interview with Albert H. Kramer, Former Dir. of Consumer Prot., FTC (May 4, 2020) [hereinafter Kramer Interview]. Kramer had worked at a large D.C. law firm before coming to the FTC, which, as he recounts, initially caused staff to treat him with heavy skepticism. *Id.*

access to mass media, in part by heavily regulating advertising. Westen had created a firm that advocated for regulations that would expand the diversity of views that had a platform in the public sphere, including advertising regulation.[324]

Work on the proposed rule proceeded quickly. FTC staff examined available research on advertising, the health effects of sugar, the relevant legal authority (including First Amendment concerns in light of recent innovations in commercial speech doctrine), and previous regulatory and legislative deliberations on the subject. The resulting report concluded that sufficient evidence had now accumulated to recommend that the FTC ban all advertising to "young children" (those less than eight years old) and advertising of sugary cereals to "older children" (those less than twelve years old).[325]

FTC staff justified its decision with both a deception and unfairness rationale, without clearly favoring either. Regarding the former, staff argued that children are much easier to deceive and advertisements are designed to manipulate them.[326] Regarding the latter, staff emphasized "the striking imbalance of sophistication and power between well-financed adult advertisers, on the one hand, and children on the other, many of whom are too young even to appreciate what advertising is" and the history of the FTC's solicitousness for children's vulnerabilities.[327] It also appealed to a race to the bottom rationale familiar to the unfair competition debates of decades earlier: pointing out the unfairness of the "sugar derby" to "companies [that] lose their market shares to other companies less willing to be 'out-sugared.'"[328] Summing up the harm to children's health, to their relationships with their parents, and to other food companies and weighing it against the negligible benefits of enabling children, especially small children, to be advertised to (given the "purely manipulative—as opposed to informative—nature of the advertising"),[329] staff concluded that advertising to children, and especially advertising sugary cereal, undermined consumers' interests much more than it benefited them. They also concluded that children, given their cogni-

---

324 *See* Westen Interview, *supra* note 259.

325 Ellis M. Ratner, Randell C. Ogg, John F. Hellegers, Sandra Adair, Grace Polk Stern & Lawrence Zacharias, Fed. Trade Comm'n, FTC Staff Report on Television Advertising to Children 10–12 (1978) [hereinafter FTC 1978 Staff Report].

326 *See id.* at 158–75.

327 *Id.* at 28.

328 *Id.* at 23, 35.

329 *Id.* at 176.

tive capacity, were regularly deceived by ads.[330] Notably, the staff did not frame its unfairness analysis in terms of the Cigarette Rule.[331] It appealed to that rule as one articulation of unfairness but left open the possibility of others.[332]

Meanwhile, Westen traveled around the country to collect views from academics, advertising industry representatives, and members of the public interest community. Taking these perspectives into account and drawing from his previous experience with advertising regulation, he drafted a memo that analyzed a variety of regulatory options, arranged from mild (e.g., restricting advertising that showed toys doing things they couldn't actually do) to strong (prohibiting all advertising to children too young to understand).[333] When presented with the memo, Pertschuk proposed putting them all out for comment and trying out the new Magnuson-Moss rulemaking procedure to facilitate a genuine public debate.[334] He expected resistance, but not backlash.

Accordingly, the Notice of Proposed Rulemaking floated a few possibilities for deliberation and public comment and made clear that other possibilities were open.[335] Rulemaking proceeded under the newly enacted Magnuson-Moss Warranty Act, beginning with a quasi-legislative process to collect views and set rules for a quasi-adjudicative process that would follow.[336] Hearings took place in January and March 1979, and over sixty thousand comments were submitted, many of which were letters from concerned parents, organized by local Parent Teacher Associations.[337] Among the studies presented during the proceedings was a study by Howard Beales himself, then a

---

[330] *See id.* at 172–75 (discussing the inherent deceptiveness of advertising to less developed brains).

[331] *See id.* at 189 (analyzing three potential tests, only one of which would treat the Cigarette Rule as definitive, and favoring one that "is based specifically on the present facts, rather than on prior formulations").

[332] *Id.* at 184 ("[W]e know of no case since the issuance of the *Cigarette Rule* . . . in which the Commission has demonstrated the unfairness of a practice by measuring it rigorously against each of the *Cigarette Rule's* three criteria.").

[333] Westen Interview, *supra* note 259.

[334] *Id.* As relevant here, Magnuson-Moss created a procedure for the FTC to make industry-wide rules under its UDAP (but not its UMC) authority. *See* Magnuson-Moss Warranty Act, Pub. L. No. 93-637, §§ 201–02, 88 Stat. 2183, 2193–98 (1975). Although Magnuson-Moss is now seen as creating an unnecessarily drawn-out regulatory proceeding (compared with APA procedures), at the time it was written (primarily by Pertschuk himself, working as a staffer for Senator Magnuson), it was viewed as part of the project of democratizing the administrative state. *See* Pertschuk, *supra* note 253, at 43–45.

[335] *See* Children's Advertising: Proposed Trade Regulation Rulemaking and Public Hearing, 43 Fed. Reg. 17,967, 17,969 (proposed Apr. 27, 1978).

[336] FTC 1981 Staff Report, *supra* note 319, at 12–13.

[337] *Id.* at 13.

staff economist fresh from his Ph.D. program at the University of Chicago economics department. It tracked how the advertising differed depending on what portion of the audience was likely to be children.[338] His work was accompanied by studies from psychologists, from researchers on television's history, from the FCC, and from industry's own research.[339] Initially Carter was supportive, Congress was supportive, and the public was overwhelmingly supportive. In a 1979 ABC-Harris poll, seventy-eight percent of respondents expressed support for a ban if limited to children under five and seventy-two percent expressed support for a ban if limited to children under eight.[340] Through the public comment process, "[t]he public response, overwhelmingly in favor of regulation [of advertising to children], filled twenty feet of shelf space at FTC headquarters."[341]

The view from early 1979 was that of the FTC beginning to test out its ability to recalibrate standards of fair dealing in various markets using a more systematic approach to consumer protection based on expanding consumers' voice and extensive empirical research. The FTC was also involved in expanding its antitrust approach: targeting the big oil companies and big cereal companies, among other things.[342] KidVid was only part of a broader shift towards more active regulation of consumer-facing practices. Having built on past efforts to regulate advertising, to regulate practices targeting children, and even to regulate sugary cereal, it was a novel initiative, but not a dramatic deviation. But the ground was shifting. And a massive business backlash was yet to come.[343]

---

338 *See* J. Howard Beales, III, Fed. Trade Comm'n, An Analysis of Exposure to Non-Network Television Advertising 11 (1978) (observing, for example, that "[t]he fraction of children's exposure to advertising accounted for by highly sugared products rises consistently and significantly as the percentage of children in the audience increases").

339 *See, e.g.*, Susan C. Greene, Brian F. Fontes, Lois E. Wright & Florence Setzer, Fed. Commc'ns Comm'n, Television Programming for Children: A Report of the Children's Television Task Force (1979); Brian F. Fontes, Study of Separation Devices Used in Saturday Morning Children's Television (1979); Jerry B. Duvall, An Economic Analysis of Advertiser Supported Television Broadcasting Markets (1979); John D. Abel, Amount and Scheduling of Children's Television Programs: 1973–74, 1977–78 (1979) [all sources on file with author from a Freedom of Information Act Request].

340 Pertschuk, *supra* note 253, at 49.

341 Rick Perlstein, Reaganland: America's Right Turn, 1976–1980, at 246 (2020).

342 *See* William E. Kovacic, *"Competition Policy in Its Broadest Sense": Michael Pertschuk's Chairmanship of the Federal Trade Commission 1977–1981*, 60 Wm. & Mary L. Rev. 1269 (2019) (recounting the FTC's ambitious expansion of antitrust enforcement under Pertschuk).

343 Ralph Nader was a notable exception. He thought that attempting to regulate advertising was political suicide, because the public was not up in arms about advertising

# V
# The Business Backlash

## A. Corporate Mobilization, Neoliberalism, and the Anti-Consumerist Countermovement

In 1971, future Supreme Court Justice Lewis Powell authored a now infamous memorandum arguing that corporate managers and owners must become more comfortable advancing their shared political interests through organizing, lobbying, funding research, and investing in public relations.[344] Powell had been spooked by several movements, but he singled out Ralph Nader's consumer organizing in particular as "[p]erhaps the single most effective antagonist of American business . . . a legend in his own time and an idol to millions of Americans."[345] And his own suggestions for how to create a countermovement were directly inspired by Nader's approach.[346]

Whether Powell's memorandum was cause or consequence of the shift, business leaders began doing exactly what he recommended.[347] Corporations created and/or expanded their "government affairs" departments. CEOs were selected in part based on their knowledge of political dynamics. Trade Associations also became more oriented towards relationships with elected officials and regulatory agencies.[348] The (national) Chamber of Commerce increased its membership more than fourfold between 1967 and 1980.[349] The executives of the most

and "if you take on the advertisers you'll end up with so many regulators with their bones bleached in the desert." Perlstein, *supra* note 341, at 246.

344 Confidential Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Educ. Comm. Chairman, U.S. Chamber of Com. (Aug. 23, 1971), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo.

345 *Id.* at 6.

346 *Id.* at 29–30 (suggesting businesses adopt a similar "aggressive attitude" to that taken by "the Naders, the Marcuses and others who openly seek destruction of the system"); *see also* Adam Winkler, We the Corporations: How American Businesses Won Their Civil Rights 287–89 (2018) (discussing the development of Powell's strategy).

347 Kim Phillips-Fein presents compelling evidence that Powell's memorandum was at least a proximate cause for the strengthened right-wing organizing push in the 1970s, though she is clear that the memorandum did not come out of nowhere, but rather "crystallized a set of concerns shared by business conservatives in the early 1970s." Kim Phillips-Fein, Invisible Hands: The Businessmen's Crusade Against the New Deal 162–64 (2009) ("Many [of those who built up the neoliberal infrastructure in the 1970s] who read the memorandum . . . cited it afterward as inspiration for their political choices."). Benjamin Waterhouse argues that the unification of business can be attributed to the politics of inflation, which pitted all of business against both wage and price controls. *See* Benjamin C. Waterhouse, Lobbying America: The Politics of Business from Nixon to NAFTA 125–33 (2013).

348 *See* Vogel, *supra* note 228, at 197 (chronicling the political resurgence of business); Drutman, *supra* note 260, at 58 (describing the growth of corporate lobbying).

349 Drutman, *supra* note 260, at 57.

elite corporations separately formed the Business Roundtable in 1972.[350] With support from the Chamber of Commerce, small businesses formed their own Small Business Legislative Council in 1977.[351] The Media Institute was created in 1976 to develop public relations strategies and to cultivate relationships with reporters.[352] And these were only the beginnings of what would eventually become a vast infrastructure to promote corporate interests.

During this organizing push, businessmen discovered the political usefulness of a well-funded coterie of pro-business intellectuals, especially economists and lawyers focusing on "economic analysis."[353] Many of these intellectuals had developed their thinking as part of an overlapping group of "neoliberal thought collectives" that had benefited from funding from the members of the business elite who sought to foment resistance to the New Deal.[354]

Neoliberalism formed out of a shared project among pro-capitalist liberals, starting in the 1940s, to reconstruct the classical liberal view of the market as a paradise of unplanned order and to rearticulate the problem with government intervention and "planning" in light of the catastrophic apparent rebuttals of the Great Depression and the New Deal.[355] It was clear to most participants in this project that *laissez faire* no longer made sense—that successful markets required strong governments to support them.[356] Their shared concern was to make sense of their intuition that state power should be exercised only to clear the space for markets, to "push[] policies to deepen the power of competition to shape and direct human life."[357] In historian of neoliberalism Quinn Slobodian's encapsulation, "[t]he norma-

---

350 VOGEL, *supra* note 228, at 198.

351 *Id.* at 199.

352 *Id.* at 220.

353 *See id.* at 220–27.

354 The term "neoliberal thought collective" is from Philip Mirowski. *See* THE ROAD FROM MONT PÈLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE (Philip Mirowski & Dieter Plehwe eds., 2009) [hereinafter THE ROAD FROM MONT PÈLERIN]. *See also* PHILIP MIROWSKI, NEVER LET A SERIOUS CRISIS GO TO WASTE: HOW NEOLIBERALISM SURVIVED THE FINANCIAL MELTDOWN 27–88 (2013) (discussing the idea of a "thought collective" and how it pertains to neoliberalism); Philip Mirowski, *Neoliberalism: The Movement that Dare Not Speak Its Name*, 2 AM. AFFS. J. 118 (2018), https://americanaffairsjournal.org/2018/02/neoliberalism-movement-dare-not-speak-name (discussing why people who once would have identified as neoliberals often reject the label "neoliberalism").

355 *See generally* THE ROAD FROM MONT PÈLERIN, *supra* note 354; ANGUS BURGIN, THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION 87–122 (2015).

356 *See* Grewal & Purdy, *supra* note 55.

357 QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 16 (2018).

tive neoliberal world is not a borderless market without states" but a legal regime that constructs the space for competition and keeps it "safe from mass demands for social justice and redistributive equality."[358]

All early neoliberals built off of Adam Smith's notion of a market as a social space in which uncoordinated, voluntary, pairwise, and self-interested exchanges produce an emergent order that no single individual controls.[359] The beauty of a market, on this way of thinking, is that it allows individuals to bargain over the details of the social space that affect them most directly (e.g., how much wheat they need), customizing the world to each person's specifications exactly insofar as they are consistent with everybody else's. A market produces order out of individual self-interest without need for coordination beyond what is necessary to get the market going.

Though they aimed in the same direction, neoliberals disagreed on a great deal, including what exactly it is about markets that makes them so important and, particularly, how exactly to adapt the core of classical political economy to the new realities of huge industrial concerns and unprecedented societal complexity was a topic of heated debate.

For some neoliberals—Friedrich Hayek most influentially—this purported quality of "spontaneous ordering" is almost inherently valuable because of the sublimity of an undesigned design.[360] Although Hayek has had a good deal of influence on neoliberalism in the United States, much more important for our story is the form of neoliberal thinking that built on neoclassical welfare economics, which now usually goes simply by the name "economics" or "economic analysis."[361] Neoclassical welfare economics is best understood as an offshoot of the liberal utilitarian moral tradition that developed alongside classical political economy. As a variation on utilitarianism, it accepts that the goal of society should be to maximize "welfare." As a branch of the liberal tradition, it seeks to define "welfare" in a way that allows each individual to choose what is best for them. It does so

---

358 *Id.*

359 *See generally* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., The Modern Library 1937) (1776). As William Boyd points out, this notion of no single person controlling the market (and of indexing value to labor) seems to have taken from the Aristotelian-Thomistic tradition of moral economy reasoning, despite political economy's disavowals of that form of reasoning. *See* Boyd, *supra* note 80, at 734.

360 *See generally* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 160 (1960); SLOBODIAN, *supra* note 357, at 224–40.

361 *E.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. 2014).

by treating welfare as whatever a person chooses when acting "rationally" (where rationality is modeled as a maximizing function).[362]

Neoclassical welfare economics was not developed exclusively by or for neoliberals; indeed, many of its most influential early practitioners were committed socialists using neoclassical models to improve the capacity of a central authority to plan in a rational way.[363] Nevertheless, the most influential forms of neoclassical welfare economics are those that have been used to tout the value of nonplanning, "decentralized" market ordering. Unlike Hayekians, neoclassical welfare economists conceptualize the value of markets in terms of their ability to maximize welfare (and by agents with perfect information)—to allocate resources "efficiently," where "efficient" means "Pareto optimal," i.e., in a way that cannot be changed without making somebody worse off.[364] But the distinction should not be overemphasized: "Welfare" is, after all, defined in terms of the uncoordinated rational choices of self-interested individuals, and there was plenty of cross-pollination between schools.[365]

The basic neoclassically-inflected neoliberal inclination is as follows: Since the ideal form of the market meets the conditions for social optimality that neoclassical welfare economics posits, actually existing social formations should be made as much like the ideal form of the market as possible. Government action should be restricted to constructing markets (setting up basic institutions like property, contract, corporations, and the like) and leaving them alone—unless it is clear that they have "failed" because some discrete aspect of reality

---

362 I am heavily simplifying, because to do anything else would take us well beyond the main point of this Article. For further elaboration of the basics of the relationship between welfarism, ordinalism, and utilitarianism, see HAUSMAN, MCPHERSON & SATZ, *supra* note 140, at 107–45.

363 *See* Tadeusz Kowalik, *Lange-Lerner Mechanism*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS 7598, 7598 (3d ed. 2018); A.P. Lerner, *Economic Theory and Socialist Economy*, 2 REV. ECON. STUD. 51 (1934); Oskar Lange, *On the Economic Theory of Socialism: Part One*, 4 REV. ECON. STUD. 53 (1936); Oskar Lange, *On the Economic Theory of Socialism: Part Two*, 4 REV. ECON. STUD. 123 (1937).

364 Again, I am simplifying. This describes the Pareto criterion. The Kaldor-Hicks criterion is the main alternative. *See generally supra* notes 140–41 (discussing these two criteria and providing sources). Social welfare functions can, of course, be defined in any number of ways. *See* ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY 117–22, 817–50 (1995). But alternative definitions rarely appear in the neoclassical welfare economics literature, and certainly the various definitions are well beyond the scope of the debate in the field of consumer protection. *See* Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1660 (2018).

365 *See* PHILIP MIROWSKI & EDWARD NIK-KHAH, THE KNOWLEDGE WE HAVE LOST IN INFORMATION: THE HISTORY OF INFORMATION IN MODERN ECONOMICS 66–101 (2017) (discussing the influence of Hayek on neoclassical accounts of the role of information in market design).

deviates from the neoclassical ideal (e.g., "transaction costs" or "externalities"). The left-right divide within neoliberal frameworks usually pivots around disagreements as to the extent of "failure" in any given market and the relative costs of correcting for them.

As already mentioned, these views were developed with ample support—and often in conversation with—anti-New Deal/anti-socialist businessmen.[366] Although neoliberals' views were mostly sincerely held (indeed, they were fringe views in the academy at the time), they were not unaware that they were receiving funding largely because their ideas were useful to businessmen.[367] It is sometimes difficult, at least for this author, to tell the difference between neoliberals supporting the interests of big business for principled reasons and supporting them because of who funds their research.

The origin of the "Chicago School" is instructive in this regard. With support from small foundations set up by right-wing business owners to fund research, Hayek worked with Aaron Director and Aaron Levi to turn the University of Chicago into a center for reconceptualizing the justification of the "free market."[368] During the course of the initial Free Market Study and then the Antitrust Project that followed, classical liberal skepticism about big business that was shared by most pro-capitalist political economists—including Director, Levi, and other participants in this study—began to be replaced with the more business-friendly presumptions that the economy works *as if* competitive, even if (or especially if) control over industries is consolidated in one, two, or three big firms.[369]

One can detect a similar overlap in interests between funders and marginal academics in the emergence of the idea of "consumer sovereignty" and the conception of consumer protection that went with it. Though the idea that "[c]onsumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer"

---

366 *See* Rob Van Horn & Philip Mirowski, *The Rise of the Chicago School of Economics and the Birth of Neoliberalism*, *in* The Road from Mont Pèlerin, *supra* note 354, at 139, 158–59; Kim Phillips-Fein, *Business Conservatives and the Mont Pèlerin Society*, *in* The Road from Mont Pèlerin, *supra* at 354.

367 On the early development of neoliberal thinking more generally, and businesses' role in funding it, see sources cited *supra* note 354 as well as Phillips-Fein, *supra* note 347, at 3–67; Burgin, *supra* note 355. Another instructive primer is The Handbook of Neoliberalism (Simon Springer et al. eds., 2016).

368 *See* Van Horn & Mirowski, *supra* note 366; Edward Nik-Khah & Robert Van Horn, *The Ascendancy of Chicago Neoliberalism*, *in* The Handbook of Neoliberalism, *supra* note 367, at 27.

369 *See* Robert Van Horn, *Reinventing Monopoly and the Role of Corporations*, *in* The Road from Mont Pèlerin, *supra* note 354, at 204, 216–30; Olsen, *supra* note 186, at 520–25.

can be traced back at least to Adam Smith,[370] the notion "of the consumer as independent and sovereign 'voter'. . . has its origins in the interwar battles over the legitimacy of marketing as a social technique" that led, among other things, to the Wheeler-Lea Act.[371] Business propaganda during this period focused on "consumer's freedom of choice" as a way to vindicate the importance of the profit motive.[372] But business owners got little traction—they needed a more detailed elaboration of how consumer protection undermines "the market" and its inherent ability to serve consumers.

Enter "consumer sovereignty." The term was apparently first used by the British economist and devoted neoliberal William Harold Hutt in an unpublished 1931 essay.[373] It was quickly put into heavy rotation by other neoliberals, including Hayek.[374] For Hutt and his comrades, framing the market in terms of the decentralized sovereignty of consumers "was a solution to the demands of national sovereignty" made by those seeking to assert collective power over capitalists and former colonists.[375] The idea of consumer sovereignty is that in a "free market" where firms must compete for business to survive, individuals collectively control the social provisioning process—they are "sovereign" over it—merely by choosing between commodities.[376] Consumers exert such sovereignty without exercising any form of political power, engaging in any form of collective action, or even consciously attempting to further their goals, because a firm cannot stay in business unless it meets the demands that consumers express through their purchase decisions. Indeed, attempts to exert collective control over the market, in this account, will *undermine* consumer sovereignty. One can already see how this could be useful to businesses seeking regulatory relief.

---

370 SMITH, *supra* note 359, at 625. Pertschuk had this quote framed on the wall of his office at the FTC. *See* Niesen, *supra* note 259, at 192.

371 Stefan Schwarzkopf, *The Consumer as "Voter," "Judge," and "Jury": Historical Origins and Political Consequences of a Marketing Myth*, 31 J. MACROMARKETING 8, 8 (2011).

372 *Id.* at 10; *see also* COHEN, *supra* note 187, at 55; Olsen, *supra* note 186, at 512 n.11.

373 Schwarzkopf, *supra* note 371, at 12; SLOBODIAN, *supra* note 357, at 118; *see also* W.H. Hutt, *The Concept of Consumers' Sovereignty*, 50 ECON. J. 66 (1940).

374 SLOBODIAN, *supra* note 357, at 118.

375 *Id.* Hutt would later defend several aspects of apartheid in South Africa. *See id.* at 172–78.

376 *See* Maxime Desmarais-Tremblay, *W.H. Hutt and the Conceptualization of Consumers' Sovereignty*, 72 OXFORD ECON. PAPERS 1050, 1051 (2020) (quoting Hutt as stating that "[t]he consumer is sovereign when, in his role of citizen, he has not delegated to political institutions for authoritarian use the power which he can exercise socially through his power to demand (or to refrain from demanding)").

Consumer sovereignty can be glossed in various ways, and early on it was not closely tied to an assumption of consumer rationality.[377] Even anti-New Deal, pro-capitalist liberals in that era (e.g., Joseph Schumpeter, Friederich Hayek, Frank Knight, Herbert Simon) did not think of individuals as rational optimizers, even if they did stress the "discovery function of democratic competition" and the dangers of democratic statecraft.[378] But as neoliberalism became more closely tied to the Chicago School of neoclassical economics in the United States, the idea of consumer rationality and "consumer welfare" became more important. Synthesizing the work of others in the area (such as Director, Levi, Milton Friedman, Gary Becker, Sam Peltzmann, and Robert Bork), George Stigler's "idea of the utility-maximizing consumer as a unified framework that could be applied to human behaviour in many, if not all, parts of society" became enormously influential starting in the 1960s.[379] Although many neoclassical thinkers—whether part of the neoliberal thought collective or otherwise—have emphasized the way the real world *deviated* from this ideal, Chicago School thinkers were much more inclined to treat the ideal as a good model of any actually existing market not distorted by rent-seeking regulations.[380] Business leaders now had their respectable and highly technical arguments for leaving the market alone to serve consumers better.

Building off this notion, the field of "information economics"—developed based on Stigler's and Philip Nelson's formative articles in 1961 and 1974, respectively—became the basis of neoliberal thinking about what role consumer protection law might (or might not) play.[381]

---

377 Hutt was an Austrian School thinker rather than a neoclassical thinker. Consumer sovereignty, for him, "was not primarily an empirical assumption about the rationality or the optimality of individual decisions." *Id.* at 1061. Like Hayek and others, he rejected the neoclassical method of merging normative and empirical assumptions about how markets work. For him, consumer sovereignty was a normative ideal towards which a properly liberal order should strive. *See id.*

378 Schwarzkopf, *supra* note 371, at 9–12; Olsen, *supra* note 186, at 515–17 (discussing how early Chicago School thinkers were not committed to the idea of a rational consumer); *see also* Slobodian, *supra* note 357, at 5–7.

379 Olsen, *supra* note 186, at 525.

380 This position is often justified not in terms of its realism but in terms of its "predictive power." *E.g.*, Posner, *supra* note 361, at 17–18.

381 George J. Stigler, *The Economics of Information*, 69 J. Pol. Econ. 213 (1961); Phillip Nelson, *Advertising as Information*, 82 J. Pol. Econ. 729 (1974). Many of the major articles on FTC consumer protection policy in the 1970s and early 1980s rely on the frameworks laid out in these articles. *E.g.*, Robert Pitofksy, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661 (1977); Robert B. Reich, *Toward a New Consumer Protection*, 128 U. Pa. L. Rev. 1 (1979); Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & Econ. 49 (1981). Philip Mirowski and Edward Nik-Khah have argued that these

Whereas institutionalists had thought businesses could quite easily manipulate consumer desires, Chicago School thinkers simply ruled out this possibility by assumption.[382] Consumer desires were taken as a given and outside the bounds of inquiry ("exogenous"), their tendency to pursue them perfectly and relentlessly taken as obvious.[383] What was needed, then, was a way to think about how it could be that consumers could be perfect welfare maximizers despite apparent evidence of bad decisionmaking. The answer of information economics is: Unlike in the ideal world, information is always incomplete because it is costly to produce and acquire, and consumers maximize as well as possible with the incomplete information they have. Advertising thus comes to appear not as the practice of monopolist firms with more money than competitors to spend manipulating consumer desires, but as an effort to disseminate the most useful information possible.[384] Then the question—for consumer protection among other areas—is how to design markets to align incentives so that the competitive process results in consumers getting the information they need to maximize their preference functions.

Another important neoliberal tendency, also buttressed by the theoretical framework of neoclassical welfare economics, was the development of the idea of the "cost-benefit analysis" as a way to constrain agency decisionmaking. Early forms of cost-benefit analysis made their way into the executive branch—the Department of Defense, originally—via the efforts of technocratic liberals with connections to the RAND Corporation to "rationalize" the policymaking process.[385] During the 1960s and 1970s, multiple agencies did what Weinberger did during his FTC reforms and created an "Office of

---

articles were actually relatively late developments in a longer history of the increased importance of the concept of "information" to mainstream economic analysis and to its neoliberal policy recommendations. *See* Philip Mirowksi & Edward Nik-Khah, The Knowledge We Have Lost in Information: The History of Information in Modern Economics 39–41 (2017). Surely they are correct, but, given its enormous influence on consumer protection thinking and thinking within the FTC in particular, Stigler's work serves as a useful starting point.

382 *See* Olsen, *supra* note 186, at 520.

383 *See* George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 Am. Econ. Rev. 76 (1977) (the title references the Latin maxim meaning: "In matters of taste, there can be no disputes").

384 *See, e.g.*, Lester G. Telser, *Advertising and Competition*, 72 J. Pol. Econ. 537, 558 (1967) (arguing that "advertising is an important source of information").

385 *See* Elizabeth Popp Berman, *From Economic to Social Regulation: How the Deregulatory Moment Strengthened Economists' Policy Position*, 49 Hist. Pol. Econ. 187, 189–91 (2017); Binyamin Appelbaum, The Economists' Hour: False Prophets, Free Markets, and the Fracture of Society 185–201 (2019). The RAND Corporation was created by the Douglas Aircraft Company in 1948 to assist with military research. It became a haven for rational-choice analysis, including early developments in game theory

Policy Planning" to bring some form of mathematized policy planning to the regulatory process.[386] As Beth Popp Berman explains, "[o]ffices of policy analysis created lasting ties between the executive branch and the discipline of economics, and in the late 1970s the deregulatory movement would build on their institutional legacy."[387] Over the course of the 1960s, the increasingly neoclassical economics discipline came to believe that too much regulation hurt consumers and that regulatory agencies were inclined to ignore the costs of their efforts.[388] Vehemently anti-regulatory versions of these arguments developed at the American Enterprise Institute's Center for the Study of Regulation, founded in 1976 in the wake of Powell's memo.[389] And by the "mid-1970s, the center of gravity for regulatory conversation shifted away from the liberal, technocratic Brookings [Institution] . . . and toward the conservative, rapidly growing American Enterprise Institute."[390] Businesses increasingly funded work on cost-benefit analysis as a way to develop evidence that the costs *they* took on were harmful to the *public* writ large.[391] It was in this form that modern cost-benefit analysis began its long march through the regulatory state during the Reagan Administration, with future FTC Director James Miller in the lead.[392]

Although these neoliberal tendencies of thought were developed with the support of a few politically committed capitalists, most businessmen were unfamiliar with them. Support had not yet coalesced to put these tendencies into practice except in piecemeal form. For instance, when Richard Posner, who had been converted to neoliberalism under the direct tutelage of Director Miller and Stigler,[393] wrote a separate statement in the 1969 ABA report that all but called for the abolition of the FTC on the grounds that it could not be justified applying the logic of neoclassical economics,[394] it was mostly ignored.

---

and global nuclear strategy. *See A Brief History of RAND*, RAND, https://www.rand.org/about/history/a-brief-history-of-rand.html (last visited Dec. 25, 2020).

[386] Popp Berman, *supra* note 385, at 191.

[387] *Id.* at 191.

[388] *See id.* at 192–93 (noting economists' beliefs that regulation hurt consumers and that regulators did not always act in the public interest).

[389] *Id.* at 194 (discussing the creation of the Center for the Study of Regulation); Phillips-Fein, *supra* note 347, at 166–84 (discussing how the mobilization created by Powell's memo created and reinvigorated several right-wing think tanks, including AEI).

[390] *Id.* at 200–01.

[391] *Cf. id.* at 203 (stating that the Reagan Administration's emphasis on cost-benefit analysis was considered "a backdoor through which industry could intervene in the regulatory process").

[392] Appelbaum, *supra* note 385, at 204.

[393] *Id.* at 144.

[394] *ABA Commission Report*, *supra* note 251, at 982–1009 (separate statement of Richard A. Posner).

There was as yet an inadequate institutional infrastructure to turn these radical attacks on regulation into state policy.

As businessmen became more politicized in the 1970s—the historian Rick Perlstein refers to them as "Boardroom Jacobins"—they began to build these institutions.[395] One of the first steps was spreading a vulgarized version of neoliberal gospel—touting the magic of "the market"—to the masses. For example, in the middle of the 1970s, the Ad Council ran a campaign touting the virtues of a free enterprise system across multiple media outlets and providing free booklets to schools and colleges, reaching a substantial portion of the population.[396] Much of this advertisement ran free of charge, as advertising firms convinced publications that these were "educational" materials.[397]

Meanwhile, consumer advocates found themselves on more precarious ground. The stagflationary conditions of the mid- to late-1970s—the "panic at the pump"—made the public more skeptical of institutions, more alienated, and more open to arguments that emphasized individual grit over collective power.[398] Inflation made consumers more price conscious and further divided the interests of organized labor and organized business (at least as understood by the leaders of each).[399] The federal government's failure to arrive at a coherent or effective approach to dealing with the simultaneous inflation and recession further delegitimized the Keynesian consensus, especially after the crises of Watergate and Vietnam.[400] Many of the "new class" who had formed the base for pro-consumer skepticism of

---

[395] PERLSTEIN, *supra* note 341, at 188; *see also* WATERHOUSE, *supra* note 347, at 183–85 (discussing businesses' embrace); APPELBAUM, *supra* note 385, at 161–84 (discussing deregulatory changes).

[396] Niesen, *supra* note 259, at 182.

[397] *See id.* at 173–74.

[398] *See* MEG JACOBS, PANIC AT THE PUMP: THE ENERGY CRISIS AND THE TRANSFORMATION OF AMERICAN POLITICS IN THE 1970S (2016) (arguing that the energy crisis of the 1970s caused a corresponding crisis of confidence in the power of the American government); COWIE, *supra* note 322, at 167–260 (discussing Americans' increasing disconnection from the New Deal order and the fluid politics of the time).

[399] *See* COWIE, *supra* note 322, at 221–36 (describing anti-union backlash in reaction to 1970s inflation and noting the growing divide between business and labor); VOGEL, *supra* note 228, at 233 (explaining that "[b]y the late 1970s, government regulation was no longer seen simply as a solution to the problems created by business: it had become a problem in its own right as well"); WATERHOUSE, *supra* note 347, at 110–13 (discussing the business-labor divide in 1970s America).

[400] *See* APPELBAUM, *supra* note 385, at 57–80 (discussing macroeconomic debates and their relationship to stagflationary conditions); GRETA R. KRIPPNER, CAPITALIZING ON CRISIS: THE POLITICAL ORIGINS OF THE RISE OF FINANCE 58–84 (2011) (situating macroeconomic debates within the social politics of distribution); PERLSTEIN, *supra* note 341, at 3–47 (situating the electoral politics of the time within these social dynamics).

big business entered the business world themselves, especially in the "knowledge economy"—accommodating themselves to the more pro-business politics of the new "professional-managerial class."[401] Consumer advocacy organizations all found it harder to raise money and retain, let alone recruit, members, and the rapid increase in the number of these organizations had them competing for support.[402] Much of the young blood in the Democratic Party was more interested in checking the power of government than in checking the power of business.[403] "Deregulation"—that is, reregulation in favor of capital accumulation[404]—also became part of the agenda of the emerging class of neoliberals (a.k.a. "New Democrats" or "Atari Democrats") in the Democratic Party.[405] These "New Democrats" thought that the political left should embrace the power of markets and adopt the frame of analysis developed by the neoliberal thought collectives that participated in the business backlash.[406] They formed the left wing of the emerging hegemonic camp within the neoliberal movement.

Because consumer protection law was beginning to threaten the prerogative of capitalists in the inflationary environment of the mid-1970s and because it felt especially threatening to the small-margin businesses that provided crucial organizing power to the new big-small business coalition, it was a target of the Boardroom Jacobins from

---

401 VOGEL, *supra* note 228, at 233; John Ehrenreich & Barbara Ehrenreich, *The Professional-Managerial Class*, *in* BETWEEN LABOR AND CAPITAL 100 (Pat Walker ed., 1979) (introducing the term "professional-managerial class" and analyzing it); BARBARA EHRENREICH & JOHN EHRENREICH, DEATH OF A YUPPIE DREAM: THE RISE AND FALL OF THE PROFESSIONAL-MANAGERIAL CLASS 5–8 (2013) (discussing the professional-managerial class's corporate turn).

402 VOGEL, *supra* note 228, at 235–36.

403 *See* Matt Stoller, *How Democrats Killed Their Populist Soul*, ATLANTIC (Oct. 24, 2016), https://www.theatlantic.com/politics/archive/2016/10/how-democrats-killed-their-populist-soul/504710 (describing the Watergate Baby Democrats' belief in limited government, pro-business policies); *but see* James K. Galbraith, *The Past and Future of Antitrust*, AM. AFFS. (Feb. 20, 2020), https://americanaffairsjournal.org/2020/02/the-past-and-future-of-antitrust (arguing that political dynamics were more complicated at the time).

404 *See* Grewal & Purdy, *supra* note 55, at 2–3 (discussing "markets deployed to further capital accumulation" as a tenet of neoliberalism).

405 *See* Brent Cebul, *Supply-Side Liberalism: Fiscal Crisis, Post-Industrial Policy, and the Rise of the New Democrats*, 2 MOD. AM. HIST. 139 (2019) (discussing the New Democrats' adoption of "seemingly 'neoliberal' economic policies"); VOGEL, *supra* note 228, at 169–74 (discussing regulatory policy during the Carter Administration); Charles Peters, *A Neo-Liberal's Manifesto*, WASH. POST (Sept. 5, 1982), https://www.washingtonpost.com/archive/opinions/1982/09/05/a-neo-liberals-manifesto/21cf41ca-e60e-404e-9a66-124592c9f70d (advocating for deregulation as part of a neoliberal manifesto).

406 *See* Cebul, *supra* note 405, at 140–42 (describing the ideological formation of the New Democrats).

early on.[407] One of the Boardroom Jacobins' first victories was the defeat of a new Consumer Protection Agency (CPA), the highest priority structural reform from the third wave of consumer activism that "would have institutionalized government-funded consumer advocates as part of the regulatory process, with the power to compel companies to provide data."[408] In political scientist Lee Drutman's telling, "[i]n the early 1970s, the legislation to create the agency seemed almost certain to become law, passing by wide margins in each chamber in separate Congresses, but for procedural reasons failing to pass both chambers in the same session."[409] As the decade wore on, "business lobbyists somehow managed to hold passage of the CPA at bay through a few well-chosen congressional allies and their clever procedural tactics, buying time to turn public opinion against it through aggressive grassroots activities and issue advertising warning of a new nanny state."[410] Although Carter was swept in along with a wave of Democrats, many of the bastions of the liberal wing did not return to Congress, and the 1978 elections saw Congress shift further to the right.[411] By 1978, the balance of power had shifted enough that the CPA was defeated once and for all.[412] The FTC was next.

### *B. KidVid, Part 2: The "Stop the FTC" Campaign*

In part as a response to the growing business outcry about "costly" regulations, President Carter had set up the *Calendar of Federal Regulations* to "rate[] dozens of federal agencies according to a number of objective measurements."[413] In the fall of 1979, the second edition of this publication had the FTC "tied for third place in both [net] benefit to the public and transparency," and "the kidvid proceeding was singled out for particular praise."[414] Yet at the same time, members of Congress were stamping the floor celebrating their successful efforts at defanging the FTC, and KidVid in particular. When the *Washington Post* asked the lead author of the *Calendar of Federal Regulation* study "how the FTC could simultaneously be the

---

407 PERLSTEIN, *supra* note 341, at 190–208.

408 DRUTMAN, *supra* note 260, at 58; *see also* WATERHOUSE, *supra* note 347, at 186–91 (describing the Business Roundtable's efforts to scale back regulation).

409 DRUTMAN, *supra* note 260, at 58.

410 *Id.*

411 Niesen, *supra* note 259, at 193 (noting various electoral losses and retirements that sapped support for the FTC); Kovacic Interview, *supra* note 157 (recounting a conservative shift amongst Senate Democrats); *cf.* COWIE, *supra* note 322, at 261–312 (describing Republican legislators' increasing power during the end of the 1970s).

412 DRUTMAN, *supra* note 260, at 58; WATERHOUSE, *supra* note 347, at 187.

413 PERLSTEIN, *supra* note 341, at 604.

414 *Id.*

most competent regulator and the most anathematized. 'Maybe,' he responded archly, 'there's a correlation between the two.'"[415]

Indeed. To the Boardroom Jacobins, the FTC's growing list of rulemakings did not look so much like a long overdue correction for decades of inaction as a harrowing barrage on their social position. And to advertisers—who had an outsized role in the business lobby's public relations strategy—KidVid seemed like the thin wedge of an existential threat. And now they had built the institutional machinery to fight back.

With General Mills and Bristol-Myers in the lead and "Washington super-lobbyist Tommy Boggs" coordinating (and rumors of the tobacco lobby contributing substantially), a "war chest" of $30 million was raised to "Stop the FTC" and KidVid in particular.[416] Although that amount of money hardly registers in today's cash-drenched politics, it was unprecedented at the time and one-fourth of the FTC's budget.[417]

It seems likely that the business backlash would not have been so strong if not for the FTC's many simultaneous rulemakings against many different industries.[418] As Al Kramer put it in an interview with the author, with rulemakings against funeral directors, optometrists, real estate agents, used car salesmen, occupational licensing boards, and others ongoing, "all the respected pillars of the community were turning against the FTC."[419] This was not necessarily a bad idea in the more quiescent business politics of the early 1970s, but now that the business lobby was seeking to unify big businesses and small businesses for the first time, regulatory initiative had unwittingly created a common enemy.

With respect to KidVid in particular, the warning shot was an instantly notorious editorial (at least in the consumer protection world) in the *Washington Post* accusing the FTC of attempting to be

---

415 *Id.*

416 *See* Niesen, *supra* note 259, at 216. David Vogel gives a $16 million number. VOGEL, *supra* note 228, at 166. Rick Perlstein gives "a low of $15 million to a high of $30 million." PERLSTEIN, *supra* note 341, at 248; *see also* Westen, *supra* note 49, at 83 (estimating the figure at $16 million); Westen Interview, *supra* note 259 (discussing rumors of the tobacco industry's funding contributions).

417 Westen, *supra* note 49, at 83.

418 *See* HOOFNAGLE, *supra* note 49, at 64 (discussing FTC rulemakings against other industries); Kovacic Interview, *supra* note 157 (discussing same); Kramer Interview, *supra* note 323 (discussing same); *see also* Westen, *supra* note 49, at 87 (noting how the KidVid proceeding rallied many different industries in opposition against the FTC).

419 Kramer Interview, *supra* note 323.

the "National Nanny."[420] To many, including Pertschuk, the disdain oozing from this editorial came as a shock.[421] The *Post* had, after all, been a staunch supporter of the FTC and of third-wave consumerism, both in its investigative reporting and in its editorial line.[422] In turning so sharply against KidVid, the *Post* broke ranks: now one could say, as many did, that "even the liberal *Washington Post*" thinks the FTC has gone too far.[423]

In retrospect, the *Post*'s anti-KidVid turn should not have been so surprising. As Chris Hoofnagle has pointed out, the *Post*, like most other major newspapers at that time, relied heavily on advertisements to stay in business, and ad-funded media organizations have a history of turning pro-business when the advertising industry is threatened.[424] What is more, as Molly Niesen has documented, part of the new business lobby's ideological campaign involved targeting news executives and reporters.[425] Over the course of the 1970s, more and more newspapers had been persuaded to create space for "institutional advertising"[426] that sold "corporate ideology rather than products themselves."[427] More and more reporters were convinced of the need to include executives' perspectives.[428] The Washington Post Corporation in particular had recently gone public and begun to acquire other media companies, including several television stations.[429] These investments paid off. Rick Perlstein points out that "[p]ublisher Katharine Graham had [in the mid-1970s] asked her edi-

420 Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22, https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b.

421 *See* PERTSCHUK, *supra* note 253, at 70–71 (discussing reactions to the editorial).

422 *See id.*; Niesen, *supra* note 259, at 200–01.

423 *See* PERTSCHUK, *supra* note 253, at 69–70 (discussing the editorial's impact); PERLSTEIN, *supra* note 341, at 248 (commenting on the editorial's resonance). This line continues to be repeated in the conventional narrative. *Cf*. BEALES, ADVERTISING TO KIDS AND THE FTC, *supra* note 49, at 8 ("Even *The Washington Post*, normally a reliable friend of an activist FTC, editorialized that the proposal was 'a preposterous intervention that would turn the FTC into a great national nanny.'" (quoting *The FTC as National Nanny*, *supra* note 420)).

424 *See* HOOFNAGLE, *supra* note 49, at 63 (describing twentieth-century publishers' opposition to regulations that hurt advertising funding); STOLE, *supra* note 184, at 67 ("[T]he mass media were quite obedient to their advertising interests.").

425 *See* Niesen, *supra* note 259, at 202–07 (describing businesses' efforts to influence the news media).

426 *Id.* at 203.

427 *Id.* at 202 (citing VOGEL, *supra* note 228, at 216–18).

428 *See id.* at 207 ("[G]reater influence by businesses over mass media resulted in more favorable coverage of businesses during the late 1970s.").

429 *Id.* at 201.

torial page editor Philip Geyelin to resign because his page was too hard on business."[430]

The "National Nanny" editorial became (or perhaps already was)[431] part of the "Stop the FTC" campaign's messaging strategy. Political scientist David Vogel observed that "[t]he phrase 'national nanny' was soon picked up by . . . industry groups who began to portray the FTC as the nanny not only of the nation's children but of business as well."[432] The idea that the FTC was trying to take over the role of parents became a go-to talking point, and the *Post*'s editorial was the perfect source to cite.

Meanwhile, members of the now extensive network of neoliberal thinkers—many of whom worked in departments, as academic chairs, or for think tanks funded by Boardroom Jacobins[433]—began publishing research with a dim view of any consumer protection regulation (or other form of regulation) that did not attempt to "free[] the market from excessive regulation."[434] In late 1977, Kenneth Clarkson and Timothy Muris, two professors working at the University of Miami's evangelical Law and Economics Center built by Henry Manne, began to collect essays from members of the extended neoliberal thought collective to critique the FTC's work in the light of the Chicago School as-if brand of neoclassical welfare economics.[435] The essays were largely critical of increased FTC enforcement and included negative assessments of the vagueness of the unfairness authority and the purported incoherence of the agency's approach in

---

430 PERLSTEIN, *supra* note 341, at 218.

431 "A *Washington Star* investigation later discovered that [the National Association of Broadcasters] had workshopped language to flush out the most 'saleable' phrases—like 'national nanny,' which was [by 1979] something like a household phrase." *Id.* at 463.

432 VOGEL, *supra* note 228, at 167; *see also* PERTSCHUK, *supra* note 253, at 73–74 (discussing industry's opposition to FTC rulemaking); Westen, *supra* note 49, at 83 ("The [nanny] rhetoric stuck.").

433 On the building out of institutional support for law and economics during this era, see STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 181–219 (2008). On the massive impact that one aspect of this institutional infrastructure—the training camp on economics for federal judges—had on American law, see Elliott Ash, Daniel L. Chen & Suresh Naidu, Ideas Have Consequences: The Impact of Law and Economics on American Justice (July 25, 2020) (unpublished working paper draft), https://elliottash.com (choose "Ideas Have Consequences: The Impact of Law and Economics on American Justice" under "Revisions Requested").

434 The quoted phrase is from Dorsey D. Ellis, Jr., *Legislative Powers: FTC Rulemaking*, *in* THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR 161, 166 (Kenneth W. Clarkson & Timothy J. Muris eds., 1981).

435 *See id*. On the University of Miami, Manne, and the institution building involved, see TELES, *supra* note 433, at 108–18.

terms of an attempt to maximize "consumer welfare."[436] The collection concluded with an essay from Muris himself (keep that name in mind!) asserting that "the costs of the [FTC] appear to exceed the benefits" and advocating for drastic measures to force the FTC to use more cost-benefit analysis and to "institutionalize[]" the use of economic thinking—which, for Muris, meant Chicago-style neoclassical welfare economics—at every level of decisionmaking.[437] Other members of the growing network of radical neoliberals, including Robert Bork, would eventually be called upon to contribute further critical work on the agency and its unfairness authority in particular.[438]

But business was not content to win the battle through persuasion. A week after the FTC issued its notice of proposed rulemaking, a collection of lobbyists petitioned to recuse Pertschuk from the rulemaking.[439] The Association of National Advertisers, Inc., the American Association of Advertising Agencies, the American Advertising Federation, and the Toy Manufacturers of America, Inc. "charged that Pertschuk had made public statements concerning regulation of children's advertising that demonstrated prejudgment of specific factual issues sufficient to preclude his ability to serve as an impartial arbiter."[440] When Pertschuk declined to do so with the unanimous support of his fellow Commissioners, industry sued and won in district court.[441] Though the decision was eventually reversed on appeal, Pertschuk voluntarily recused himself to avoid any appearance of bias.[442] Robert Pitofksy—another Carter appointee to the Commission—had also recused himself because of a conflict of

[436] *See, e.g.*, Ellis, *supra* note 434, at 183 (arguing that the FTC's attempts to further consumer welfare are frustrated by the vagueness of the unfairness and deceptive acts authorities). This is not to say that the FTC did not have an incoherent approach in many areas, of course. One of the tensions in the FTC's analysis that authors of these essays exploited is the favoring of disclosure mandates that were justified by consumers' inability to make economically rational decisions.

[437] Timothy J. Muris, *What Can Be Done?*, *in* THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR, *supra* note 434, at 307, 313–14.

[438] *See, e.g.*, STAFF OF S. COMM. ON COMMERCE, SCI., & TRANSP., 96TH CONG., UNFAIRNESS: VIEWS ON UNFAIR ACTS AND PRACTICES IN VIOLATION OF THE FEDERAL TRADE COMMISSION ACT 17–22 (Comm. Print 1980) [hereinafter VIEWS ON UNFAIR ACTS AND PRACTICES] (statement of Robert H. Bork, Alexander M. Bickel Professor of Public Law, Yale Law School) (criticizing the FTC's use of its unfairness authority as overly broad). On Bork's radicalism, see, for example, PHILLIPS-FEIN, *supra* note 347, at 163 (Bork "told the American Enterprise Institute board of trustees: 'Business leaders will have to decide whether they are really willing to let the corporate system slide . . . without putting up a determined fight.'").

[439] *See* Ass'n of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151, 1155 (D.C. Cir. 1979).

[440] *Id.*

[441] Ass'n of Nat'l Advertisers, Inc. v. FTC, 460 F. Supp. 996 (D.D.C. 1978).

[442] Niesen, *supra* note 259, at 221–22.

interest.[443] The three other Commissioners were already less ambitious in their regulatory ambition—and the lawsuit made them all the leerier.[444]

The most consequential pressure came via lobbying on the Hill. The very same day that industry filed its petition for recusal, the House Appropriations Subcommittee—not usually charged with following the ins and outs of FTC rulemakings[445]—voted 5–4 to pass a bill that would have withheld funding from any regulation of food advertising, so long as that food was "safe."[446] It seems likely that lobbyists chose this particular subcommittee carefully: It had enough power to present a credible threat, but it was not the sort of subcommittee with which the FTC would have been in close contact.[447]

Soon the FTC Commissioners—who had only recently endured interrogations about their delay in regulating business in front of Congress—found themselves accused of running "a rogue agency gone insane."[448] A well-funded and well-orchestrated drama began during 1979 FTC Act reauthorization hearings in the House, carrying over into the Senate and then a series of oversight hearings in which the Commissioners were barraged with skepticism from previously quiescent or supportive legislators.[449] Funeral home owners were flown in (perhaps with Chamber of Commerce funds) to complain about the impact of the pending funeral home price disclosure rule on small businesses.[450] Business representatives from multiple industries spoke about the unfairness of Magnuson-Moss's provision of "inter-

443 *Id.* at 222.

444 *See id.* (noting that the three other Commissioners were appointed under Republican administrations and were not expected to support KidVid); Westen Interview, *supra* note 259.

445 *See* Westen Interview, *supra* note 259.

446 Niesen, *supra* note 259, at 224.

447 Westen Interview, *supra* note 259.

448 Pertschuk, *supra* note 253, at 75; *see also supra* note 297 and accompanying text (describing Congress's egging on of FTC consumer protection rulemakings).

449 "FTC Staffers were baffled by the onslaught [during appropriations hearings] until they learned that the Massachusetts backbencher [Joe Early] had been coached for the confrontation in the lobbying offices of Patton Boggs." Perlstein, *supra* note 341, at 465. The relevant hearings are as follows: *Authorizations for the Federal Trade Commission and General Oversight Issues: Hearings on H.R. 2313 and H.R. 2367 Before the Subcomm. on Consumer Protect. & Fin. of the H. Comm. on Interstate and Foreign Com.*, 96th Cong. (1979); *Authorizations for the FTC: Hearing on S. 1020 Before the Subcomm. for Consumers of the S. Comm. on Com., Sci., & Transp.*, 96th Cong. (1979); *Oversight of the Federal Trade Commission: Hearings on Oversight to Examine the Enforcement and Administrative Authority of the FTC to Regulate Unfair and Deceptive Trade Practices Before the Subcomm. for Consumers of the S. Comm. on Com., Sci., & Transp.*, 96th Cong. (1979).

450 I do not have direct evidence of this funding, but it is clear that funeral directors were coordinating with the Chamber. *See* Vogel, *supra* note 228, at 167.

venor funding" for consumer advocates to attend rulemakings but not for small business representatives like these funeral home owners.[451] The campaign was bolstered by articles and statements from legal academics on the absurdity of having an agency determine what is "fair" without clear guidelines.[452] The vagueness of the term "unfair" and the power it gave the FTC became a central talking point.

Within a few months, Congress was considering a bill that would have compelled the FTC to cease multiple rulemaking proceedings, including KidVid.[453] Debates were contentious enough that the FTC temporarily shut down because Congress was unable to come up with funding.[454] As Beales notes, "[a] congressional reaction of this magnitude is extremely unusual. Although budget disputes occasionally have shut down the government for days at a time, shutting down a single agency because of disputes over policy decisions is almost unprecedented."[455] President Carter had to personally intervene at conference committee meetings to achieve a more moderate bill—requiring, as pertaining to KidVid, that the FTC cease the proceedings to determine what the evidence so far would warrant under a decep-

---

451 *See* Harris & Milkis, *supra* note 228, at 173–77 (describing how these funds went primarily to consumer advocacy groups). On later Reagan Administration efforts to eliminate intervenor funding as part of an effort to "defund the left," see Reagan Transition Memo, *infra* note 486, at G-3 (Jan. 29, 1981); Harris & Milkis, *supra* note 228, at 205.

452 Some of these authors were opposed to unfairness and advanced arguments consistent with neoliberal movement politics. *See* Susan Bartlett Foote & Robert H. Mnookin, *The "Kid Vid" Crusade*, Pub. Int., Fall 1980, at 90 (criticizing KidVid as "a moral crusade" lacking proper evidentiary support and analysis); Views on Unfair Acts and Practices, *supra* note 438, at 17–22 (statement of Robert H. Bork) (criticizing the FTC's use of its unfairness authority as overly broad); Ellis, *supra* note 434, at 361 (criticizing the FTC's use of its unfairness authority as vague and lacking thorough evidentiary support). Others were concerned with the FTC's apparent lack of direction without wanting to eliminate its unfairness authority. *See* Views on Unfair Acts and Practices, *supra* note 438, at 96–97 (letter of David A. Rice, Professor and Associate Dean, Boston University School of Law) ("The sound alternative . . . is to insist that the FTC articulate and consistently apply on the record those criteria which will guide the Commission in its enforcement of the [FTCA]."). *Compare* Teresa M. Schwartz, *Regulating Unfair Practices Under the FTC Act: The Need for a Legal Standard of Unfairness*, 11 Akron L. Rev. 1 (1977) (arguing that the FTC's unfairness authority needs limits), *with* Views on Unfair Acts and Practices, *supra* note 438, at 165–66 (letter of Teresa M. Schwartz, Professor of Law, George Washington University) (arguing that her article should not be taken as support for narrowing the unfairness authority because the FTC has used it responsibly).

453 Vogel, *supra* note 228, at 168.

454 *See* A.O. Sulzberger Jr., *After Brief Shutdown, F.T.C. Gets More Funds*, N.Y. Times, May 2, 1980, at D1.

455 Beales, Advertising to Kids and the FTC, *supra* note 49, at 8 n.32.

tion and *not* an unfairness theory.[456] This was the last FTC reauthorization bill that Congress would sign for an entire decade.[457]

### C. The Crucible of the Unfairness Policy Statement

Most of the regulatory actions of the Pertschuk-era FTC were not premised on its unfairness authority, but nevertheless that authority received especially vehement criticism. Though the FTC leaned just as strongly on a deception rationale in its public statements and internal deliberations, it was easier to frame KidVid as authoritarian paternalism by emphasizing that the FTC was making a judgment about something as contestable as "fairness." Advertisers with experience of the Cigarette Rule might have also seen potential for unfairness to eat ever more into their profit centers.[458]

Whatever the exact mix of reasons, the FTC was faced with the possibility of losing an unfairness authority it had only just begun to use. When Senators Wendell Ford—who had close ties to the tobacco lobby—and John Danforth asked the FTC for comment on the meaning of this authority as part of the Senate's proceedings to determine whether the FTC should continue to have it, the Commission saw a chance to explain its enabling statute in a way that countered the "rogue agency gone insane" portrayal without undermining the authority to do what it was already doing.[459]

Although the Unfairness Policy Statement is now commonly treated as a break from past statements on the meaning of unfair acts, its purpose was to emphasize continuity.[460] On its face, the Statement presents itself as a synthesis of "the most important principles of general applicability" that can be drawn from "decided cases and rules."[461] Rather than using the history of consumer unfairness to articulate a *new* standard, the Statement uses that history to clarify the meaning of the closest thing to an *old* standard: the Cigarette Rule

---

456 *See* Vogel, *supra* note 228, at 168 (on Carter's intervention); Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, sec. 11 (a)(1), 94 Stat. 374, 378 (1980) (prohibiting the FTC from using its unfairness authority in the KidVid proceeding). This bill also contained a legislative veto, which was struck down by the D.C. Circuit. *See* Consumers Union of U.S., Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982).

457 Vogel, *supra* note 228, at 168.

458 Tracy Westen suggests the cigarette industry lobbied against the rule because it thought it would be next. Westen, *supra* note 49, at 87. Perhaps so, but it had also been first! The cigarette industry's opposition might be seen as evidence of increasing business solidarity.

459 *See FTC Policy Statement on Unfairness*, *supra* note 42 (mentioning Ford and Danforth's request and elucidating the FTC's use of its unfairness authority).

460 *See supra* Part I.

461 *FTC Policy Statement on Unfairness*, *supra* note 42.

(which it refers to as the "*S&H* criteria").[462] Today's three-part test—that an act or practice must cause "substantial injury" that "consumers themselves could not reasonably have avoided" and that is not "outweighed by any countervailing benefits to consumers or competition"—is not presented as the whole test: It is the Statement's parsing of the first prong of the Cigarette Rule's three-prong standard.[463]

That is not to say that the Statement simply restates the Cigarette Rule. It instead elevates the first ("consumer injury") prong, cabins the meaning of the second ("public policy") prong, and tosses aside the third ("immoral, unethical, oppressive, or unscrupulous") prong.[464] But it does so on the grounds that the FTC's experience applying the unfairness standard has clarified the relevance of each prong.[465] So the Statement rejects the third ("immoral, unethical, oppressive, or unscrupulous") prong by explaining that, though the prong was drafted to ensure that the FTC was able to "reach[] all the purposes of the underlying statute," subsequent experience had shown that determining whether a practice was "immoral, unethical, oppressive, or unscrupulous" was unnecessary in accomplishing that goal.[466] The other prongs covered everything that mattered, rendering the third prong "largely duplicative."[467]

The emphasis on continuity makes sense given that the Statement was drafted as a defensive strategy. It aimed to preserve the FTC's unfairness authority and its KidVid rulemaking in the face of opposition portraying recent uses of that authority as without precedent and beyond the pale. In a sense, the Statement was very much like the Cigarette Rule, but produced within a different political environment. It was an attempt to interpret the meaning of unfairness in light of its previous usage and previous statements of its meaning, but this time with an eye toward consolidating and legitimating authority in the face of an existential threat rather than an eye toward expanding its authority in light of decades of inattention.

The notion that the Policy Statement was a victory for "economic" rationality over hand-wavy "public policy" is also belied by text and context.

---

462 *See id.*

463 *Id.* (explaining that to satisfy the Cigarette Rule's first prong, "whether the practice injures consumers," the practice in question must satisfy three tests).

464 *Id.*

465 *Id.* ("Since [the Cigarette Rule] the Commission has continued to refine the standard of unfairness in its cases and rules, and it has now reached a more detailed sense of both the definition and the limits of these criteria.").

466 *Id.*

467 *Id.*

Start with the text. As with many FTC texts from the 1970s, the Statement draws freely from neoclassical economic, deontological, and pragmatic logics with only glancing implicit acknowledgment of potential conflicts. Among other references to neoclassical economics, the Statement declares that injury determinations must be "based, in large part, on objective economic analysis" and affirms that the Commission usually "expect[s] the marketplace to be self-correcting."[468] But it also refers to injury in terms of what is reasonable and justifiable,[469] familiar fair dealing, moral economy concepts that are at least difficult (and probably impossible) to parse by simply deferring to individual choices (as would be required to comport with neoclassical welfare economics, since it defines the good entirely in terms of idiosyncratic individual preference satisfaction). Tasking a bureaucrat to determine whether something is reasonable or justifiable is to task her with drawing moral lines—with making unavoidably interpersonal judgments about parties' obligations, legitimate expectations, and the like.[470] The Statement also draws freely from the language of "coercion" and "undue influence" without framing either in the language of relative cost and underplays the relevance of subjective "emotional impact" (which is inconsistent with a focus on preference satisfaction).[471] Moreover, it reaffirms the importance of widely agreed to public policies regardless of their "economic" logic.[472] It presents public policy as framing the context in which deliberations about injury take place, as well as potentially, though rarely, providing grounds to regulate independent of any separate injury determination.[473] Public policy and injury thus mutually define each other, although injury is given more emphasis.

This normative potpourri reflects the diversity of theoretical frameworks at the FTC of the time. Some of the staffers and Commissioners involved in drafting the statement were surely convinced that neoclassical welfare economics was the only neutral and

---

468 *Id.*

469 *Id.*

470 I argue for this point much more extensively in forthcoming work. For now, good sources that tease out the moral problem are those that pertain to private law theory. *See, e.g.*, Jules Coleman, Scott Hershovitz & Gabriel Mendlow, *Theories of the Common Law of Torts*, Stan. Encyc. Phil. (Dec. 17, 2015), https://plato.stanford.edu/entries/tort-theories (discussing the inadequacies of economic analysis in making sense of what is reasonable); Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. Rev. 323 (2012) (discussing the inherent normativity of reasonableness); Coleman & Ripstein, *supra* note 107 (discussing the impossibility of using causal descriptors or a deference to choice—via letting harm lie where it falls—in making sense of fault or harm).

471 *FTC Policy Statement on Unfairness*, *supra* note 42.

472 *See id.*

473 *See id.*

objective way to analyze moral questions. By this point, neoclassicism had almost entirely replaced institutionalism in U.S. economics departments, and, even outside the neoliberal incubators at Chicago and Virginia, neoclassicism had come to be shaped by market-fetishizing tendencies of thought.[474] And increasingly many people with such training had been brought into the agency, as economists became increasingly installed in administrative agencies by bureaucrats that thought of economics as a neutral form of policy analysis.[475] It seems likely that for these employees of the Commission, rethinking the unfairness authority presented an opportunity to place the idea of consumer sovereignty (which, as we have seen, had been developed by neoliberals in the 1930s and elaborated in the years since) at the center of the FTC's considerations and to incorporate cost-benefit analysis.

This commitment to neoclassical welfare economics did not necessarily imply skepticism of the FTC's efforts in particular or of consumer protection regulation in general. Pitofsky and Reich were favorable to KidVid, for example.[476] They translated their pro-regulatory intuitions into the neoclassical framework, drawing deeply

---

474 *See* RUTHERFORD, *supra* note 142, at 309–41 (discussing neoclassical challenges to institutionalism and noting how institutionalism was losing ground to neoclassicism by the 1950s); APPELBAUM, *supra* note 385, at 16–17 (disccussing the homogeneity of economists in the latter half of the twentieth century, despite distinctions between "freshwater" and "saltwater" approaches).

475 *See* Popp Berman, *supra* note 385, at 198–205 (discussing the move towards economic analysis in the Carter and Reagan administrations). Certainly, this describes Neil Averitt, then a staffer who has since claimed primary authorship of the Unfairness Policy Statement. *See* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713 (1997) (espousing neoclassical views in analyzing the goals of antitrust and consumer protection law); *Neil Averitt*, AM. ANTITRUST INST., https://www.antitrustinstitute.org/people/neil-averitt (last visited Dec. 23, 2020) ("He was the principal author of the Commission's 1980 policy statement on its consumer unfairness jurisdiction, and of the opinion in *International Harvester* which formally adopted that statement."). It also describes Robert Reich, then FTC Director of Policy Planning. Reich, *supra* note 381, at 1 n.† (noting Reich's role as Director of Policy Planning). Reich later became part of the class of "neoliberals" dedicated to moving the Democratic party to the right. Cebul, *supra* note 405, at 140 (discussing Reich's role in the New Democrats); David Kusnet, *A Top Neo-Liberal Turns to Pro-Labor Populism; A Trend? Robert Reich, Once Clinton's Champion of Uplift Policies, Embraces Big Government, Big Labor*, BALT. SUN, Apr. 27, 1997, at 1F (identifying Reich as "one of the first neo-liberals"). It also describes Richard Craswell, then a staffer working on the unfairness policy draft. Richard Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 WIS. L. REV. 107, 107 n.* (1981) (identifying Craswell, a well-known economic analyst of law, as staff in the FTC's Office of Policy Planning). It also describes Robert Pitofsky, then a Commissioner and later the FTC's Chair. *See infra* Section VI.B.

476 Westen Interview, *supra* note 259 (noting that Pitofsky, as a Commissioner, signed off on initiating the regulation, and subsequently issued no public objections).

from the information economics literature.[477] More anti-regulatory versions of neoclassical analysis—those that were more skeptical of "market failures" and of regulatory efforts to correct them—had not yet occupied the collective consciousness of FTC staff, even if they were banging at the gates.

Perhaps more importantly, not all authors of the Unfairness Policy Statement thought that neoclassical economics made sense of their intuitions.[478] Certainly Michael Pertschuk, who signed the Statement as Chair, did not believe in the truth of neoclassical welfare economics—he fought hard against it.[479] He, Paul Rand Dixon, and lawyers on staff were surely familiar with a more lawyerly style of neutralizing discourse.[480] This is a discourse that seeks out a neutral principle in terms of "harm," "injury," "reasonability," "substantiality," a discourse that points to well-established precedent as a way of treating a disputed issue as settled, and the like.[481] It is a discourse that attempts to resolve difficult moral questions without bias by implementing procedural regularity and an open balancing of reasons, not one that reduces all moral questions into matters of either taste or rationality, with markets as the ideal form in which tastes can be rationally maximized.

Above all, the fact that the Statement was drafted as part of a defensive strategy to preserve the FTC's unfairness authority—including its ability to apply this authority to the KidVid rulemaking—problematizes the idea that the Statement narrowed the scope of the FTC's authority or that it placed the regulation of children's advertising outside its ambit. The Statement was an attempt to articulate something that approximated a neutral principle, drawing on multiple languages of neutrality, to shore up legitimacy in light of a radical challenge. When Congress prohibited the FTC from proceeding with

477 *See* Reich, *supra* note 381, at 25 (arguing that the purpose of government intervention should be to correct the risk of consumer misinformation in evaluating product risks and hidden costs); Kramer Interview, *supra* note 323 (describing how Democrats adopted the neoclassical model of economic thinking).

478 On the battle between lawyerly and economic thinking at the FTC (framed in terms that fail to appreciate the moral stakes of law or the shortcomings of neoclassical reasoning), see HOOFNAGLE, *supra* note 49, at 13–16.

479 *See* Mark E. Budnitz, *The FTC's Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371, 395 (1997).

480 *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (criticizing the Supreme Court's decision in *Brown v. Board of Education* as unjustified by neutral principles). *But see* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 519–28 (1980) (attacking Wechsler's analysis and arguing for racial equality as the underlying neutral principle).

481 *See generally FTC Policy Statement on Unfairness*, *supra* note 42.

KidVid under an unfairness rationale—restricting it to determining whether deception applied—it was a *failure* of the Policy Statement, not an affirmation of its principles.

## VI
## Neoliberalism Entrenches

The full adoption of consumer sovereignty ideology—and the full rejection of the muscular vision of consumer protection that Pertschuk championed—required neoliberals to take over the FTC policymaking apparatus. Ronald Reagan's victory in 1980 accelerated this march through the institutions.

### A. *The Miller Era*

Reagan's ascension to the presidency was the result of the newly unified business lobby joining forces with a coalition of disaffected members of the white working class, socially conservative Christians, and suburbanite anti-tax revolutionaries that had been diligently cultivated since the Goldwater campaign.[482] His campaign presented "big government" as the problem. He took office with a laser focus on radically reshaping the regulatory landscape to leave business leaders free to pursue capital accumulation without social obligation. Soon the administrative state was being run by neoliberals who had cut their teeth explaining why the regulatory state needed to be dismantled.[483]

Reagan's transition memorandum on the FTC was drafted by James Miller, a "child of the free-market movement" who was the co-director of the anti-regulatory Center for the Study of Government Regulation at the American Enterprise Institute.[484] He would go on to lead Reagan's deregulatory agenda.[485] The memo reinterpreted the FTC's role in terms of "efficiency," glossing the Progressives' ideas in terms of promoting a free market.[486] It recommended "[t]erminat[ing] all cases based on 'social theories'. . . . The role of the Commission in

---

482 On the building of the Reagan coalition, see Kim Phillips-Fein, *Conservatism: A State of the Field*, 98 J. Am. Hist. 723, 726–29, 731–34 (2011) (summarizing recent literature); Perlstein, *supra* note 341.

483 *See* Popp Berman, *supra* note 385, at 202 ("Rather than 'regulatory reform,' [Reagan] embraced 'regulatory relief' . . . ."); Appelbaum, *supra* note 385, at 203–08 (noting the anti-regulation backgrounds of key Reagan officials).

484 Appelbaum, *supra* note 385, at 204; Hoofnagle, *supra* note 49, at 68 (crediting Miller with writing the memo).

485 Appelbaum, *supra* note 385, at 204.

486 Transition Team, Fed. Trade Comm'n, Antitrust & Trade Regulation Report, at G-1 (Jan. 29, 1981) ("As originally envisioned in 1914, the FTC was to monitor and regulate competitive practices so as to make the marketplace work more efficiently.") [hereinafter Reagan Transition Memo].

the area of consumer protection should be to replicate, to the degree feasible, the workings of an efficient market place."[487] The FTC should also adopt cost-benefit analysis, making sure to focus on the shortcomings of regulation and the benefits of the market, especially in its information-conveying capacity.[488] It should cease any skeptical or adversarial approach to business, and return to the more cooperative model of learning from experts at profit mining. Regarding unfairness specifically, "the Commission [should] define the term solely in terms of economic benefits and costs to consumers."[489] In fact, ideally Congress should undertake the task of definition instead of letting Commissioners do it. To accomplish these goals, an ideologically friendly Chair would be needed, and more staff trained in neoclassical economics would have to be hired and become more "integrated" into the regulatory process.[490]

Miller himself was appointed to be that Chair. Miller was the first economist to serve as a Commissioner, let alone Chair. And he was firmly of the Chicago School. Miller's efforts were supported by Timothy Muris—the co-editor of the book of law-and-economics essays critical of the FTC, and the author of the essay arguing that the FTC's funding should be cut to the bone unless it fully institutionalized the neoliberal understanding of the role of a consumer protection agency.[491] Perhaps in recognition of that effort, Muris served as a lawyer on Reagan's transition team alongside Miller, likely contributing drafting to its radical statement on reforms at the FTC.[492]

Like William Humphrey during the 1920s return to "normalcy," Miller was committed to remaking the FTC to defer to big business whenever possible. In Mark Budnitz's account, Miller "felt the Commission had spent too much of its resources adding costly regulation when it should have used cases and rules to 'reinforce market forces.'"[493] He contrasted his own "sober calculation" of economic reasoning with the "moralistic posturing" of Pertschuk.[494] Accordingly, he was opposed to any "adversarial" approach to business leaders and adopted the view that "agency officials should be immune

---

487 *Id.*

488 *Id.* at G-1 (calling for a closer look at the benefits of the Line of Business reporting program).

489 *Id.* at G-2, G-3.

490 *Id.* at G-2.

491 Muris, *supra* note 437, at 310–15; *see also* Budnitz, *supra* note 479, at 383–86 (discussing the scope of Miller's work and of Muris's role).

492 Timothy J. Muris, Curriculum Vitae 3 (2019), https://www.law.gmu.edu/assets/files/faculty/cv/muris.pdf.

493 Budnitz, *supra* note 479, at 378 (citation omitted).

494 *Id.* at 394.

to the influence of interaction, and that policy can be decided solely by means of objective, neutral, data-driven analysis."[495] In other words, he endorsed both direct regulatory capture and cognitive capture.[496]

The first order of business was shutting down the KidVid rulemaking. After Congress had instructed the FTC to stop rulemaking proceedings to issue a report to justify continuing, the Commission instructed staff to issue a second report that focused only on a deception justification (as required by Congress).[497] Staff concluded that "[w]hile the rulemaking record establishes that child-oriented television advertising is a legitimate cause for public concern, there do not appear to be, at the present time, workable solutions which the Commission can implement through rulemaking in response to the problems articulated during the course of the proceeding."[498] They reasoned that, because most children's shows had an audience of predominantly "older children" (i.e., seven or over) and "a ban would be predicated upon the cognitive limitations of young children, it would be inappropriate to apply it to older children possessing more advanced cognitive skills."[499] They also ruled out an alternative possibility of banning ads that use particular techniques (e.g., magical promises and fantasy, use of superheroes, voices of authority, voices of young children agreeing with announcers, children outperforming adults), because those techniques were used on younger and older children alike.[500]

What was the harm of banning advertising for children between seven and twelve years old? Staff only reproduced the boilerplate justifications from the business lobby that "truthful advertising provides benefits to both consumers and the marketplace. Advertising informs consumers as to product availability, price, and performance characteristics. Thus it facilitates consumer purchasing decisions. Moreover,

---

495 *Id.* at 382.

496 The term "cognitive capture" refers to a regulator adopting the thinking of the entities the regulator is charged with regulating. *See* SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 5–6 (2010).

497 Fed. Trade Comm'n, TRR No. 215-60, ORDER INSTRUCTING STAFF TO PREPARE RECOMMENDATIONS CONCERNING FURTHER PROCEEDINGS AND NOTIFYING INTERESTED PARTIES OF OPPORTUNITY TO COMMENT (1980) (on file with author); *see also* Children's Advertising: Request for Comment on Staff's Proposal to Terminate Rulemaking Proceedings, 46 Fed. Reg. 21,019 (Apr. 8, 1981) (giving notice of the FTC's instructions for its staff to prepare a recommendation and the subsequent proposal to terminate proceedings).

498 FTC 1981 STAFF REPORT, *supra* note 319, at 2.

499 *Id.* at 39.

500 *Id.* at 43.

it may stimulate competition among sellers of a product, resulting in lower prices for the consumer."[501] They cited no evidence for these propositions, either in general or as they pertained to children between the ages of seven and twelve specifically. They engaged in no analysis of whether such older children could be said to be deceived by some or all advertisements, even if they were more discriminating than young children. Nor did they even mention the possibility of a cost-benefit analysis that would weigh the benefits of preventing younger children from seeing advertising against the costs (such as they were) of preventing older children from seeing advertising.[502]

Similarly, with respect to advertising for sugary cereal, the staff concluded that though there was ample evidence supporting the negative health effects of sugar consumption—especially with respect to cavities—the evidence was insufficient to develop a clean-cut threshold above which a food could be deemed too sugary to be healthy.[503] The staff rejected using judgment or experimentation or appealing to the precautionary principle: The scientific data was itself supposed to produce a bright line test.[504]

Although these were real doubts among the staff, the recommendation to stop the rulemaking was not the result of concluding that the doubts were unresolveable. It was, rather, a transliteration of the writing on the wall. This report was drafted before Miller took office by staff that knew they would not have the votes on the Commission anymore. Westen says that "by March of 1981 it was clear the proceeding was doomed, there were no longer sufficient votes for it. At that point the staff decided to write a document memorializing what had been learned, if you like a kind of message in a bottle to future public interest advocates . . . ."[505]

But the Reagan coalition was not satisfied with shutting down KidVid. They wanted to make sure nothing like it happened again. And Miller surely understood that changing the FTC's thinking

---

501 *Id.* at 5.

502 Tracy Westen also mentions other concerns among staff at the time about "undermin[ing] commercial support" for children's television (which could have been counteracted by coordinating with the FCC, which was considering requiring networks to air ad-free children's television) and further difficulties with line drawing. Westen, *supra* note 49, at 85–86. But he does not mention how principles of decision—whether cost-benefit, precautionary principle, or other—would have weighed these concerns. *See generally id.* And, as this staff report was never published widely or discussed, there was no public deliberation about costs and benefits.

503 *Id.* at 86.

504 *See generally id.* On the moral responsibility of regulators and the impossibility of drawing lines based entirely on data, see Douglas A. Kysar, Regulating From Nowhere: Environmental Law and the Search for Objectivity 46–70 (2010).

505 Westen, *supra* note 49, at 84.

required restructuring how it thought. He thus expanded the Office of Policy Planning—which had been the center of neoliberal economic thought at the agency since Weinberger created it during the Nixon Administration[506]—and incorporated cost-benefit analysis and the importance of reinforcing economic rationality on the market into as many decisions as he could. He brought far fewer cases, promoting the importance of "educat[ing] businesses and consumers" instead of intervention in the market.[507] He "championed 'industry's own self-regulation' as the 'most significant inducements to truthful advertising.'"[508] And, after being rebuffed by Democrats in the Senate for attempting to shut them down directly, he used an overall FTC budget deficit to close some of the regional branches that had been the engines of the FTC's research and enforcement activity.[509]

Going further, Miller repeatedly tried and failed to get Congress to redefine "unfair" (and "deceptive")[510] while promoting a consumer sovereignty interpretation.[511] He attempted to shut down the credit practices rulemaking, which was justified on an unfairness rationale, though he eventually compromised with other Commissioners on a narrower rule than that which staff had recommended based on almost a decade of research.[512] In pursuit of his goals, Miller battled against the more liberal Commissioners that held over from previous administrations, especially Pertschuk. He attempted (often successfully) to deny them access to staff reports, shut them out of meetings where cases were evaluated, and prevent them from fully staffing their offices.[513]

### B. *The Contemporary Settlement*

Miller's efforts to have Congress enact the three-pronged substantial injury test into law finally bore fruit when Republicans took control of Congress in 1994.[514] In that year, the first reauthorization of

506 *See supra* note 386 and accompanying text (identifying Weinberger's role); Popp Berman, *supra* note 385, at 191 (discussing the trend to create Offices of Policy Planning and appointing economists to lead them).

507 Budnitz, *supra* note 479, at 391, 393.

508 Niesen, *supra* note 259, at 240 (discussing Chairman Miller's Remarks before the Association of National Advertisers on November 10, 1981).

509 Budnitz, *supra* note 479, at 388–89.

510 *Id.* at 380, 385.

511 *See id.* at 418 (describing Miller's preference for a common law adjudicatory approach, over rulemaking, because it more closely aligns with creating an efficient market structure).

512 *Id.* at 422–23.

513 *Id.* at 387.

514 *See* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691 (codifying, among other things, the substantial injury test).

the FTC since 1980 amended the FTC Act to require the FTC to run all of its unfairness analysis through the substantial injury test.[515] The amendment also prohibited "public policy considerations" from "serv[ing] as a primary basis" for a determination that "[an] act or practice is unfair," though "established public policies" could be used as "evidence . . . considered with all other evidence."[516]

This amendment clearly limited the FTC's unfairness authority, both in the trivial sense that it created some statutory standards where none existed previously and in the more substantial sense that it—at least nominally—limited the role of "public policy" considerations. But it cannot fairly be read as an attempt to rein in the FTC or to compel it to adopt neoclassical theories of the market.

Regarding the former, the Senate report (it was the Senate version of the bill that introduced the amendment) justified the amendment in terms of the FTC's own initial power-conserving reasoning for the Policy Statement: "Since the FTC's policy statement itself is based on the FTC's decided cases and rules," this amendment merely "codifie[d] existing law" and "enable[d] the FTC to proceed in its development of the law of unfairness with a firm grounding in the precedents decided under this authority."[517] Congress also rejected a proposed restriction on using the unfairness authority to regulate advertising (mostly due to First Amendment concerns, given the ever-growing commercial speech doctrine).[518]

Regarding the latter, neither the text nor the legislative reports place any explicit priority on economic reasoning or consumer sovereignty. Indeed, the Senate Report expressly disclaims the need for "numerical benefit-cost analysis," since it would frequently be "unnecessary" or even "impossible."[519]

The mildness of the reauthorization bill can be made sense of in part by positing that Congress had been assured that the FTC had, at least for the moment, internalized a more moderate version of its own power.[520] After all, neoliberalism had not only remained hegemonic, it had become bipartisan. President William Clinton had been a part of the Democratic Leadership Council, a group of political entrepreneurs who shifted the base of the Democratic Party away from the

---

515 15 U.S.C. § 45(n).

516 *Id.*

517 S. Rep. No. 103-130 (1993), *reprinted in* 1994 U.S.C.C.A.N. 1776, 1993 WL 322671, at *12.

518 For the proposal, see *id.* at *13–15.

519 *Id.* at *13.

520 *See* H.R. Rep. No. 103-138 (1993), 1993 WL 213734, at *8 (quoting then-Chair Janet Steiger on the FTC's moderation as a way of assuring Congress).

working class and towards "knowledge workers" and the professional-managerial class.[521] While this part of the middle class had once been the core of the third-wave consumerist rebellion, they had become increasingly business-friendly, skeptical of government bureaucracy, and removed from association with the working class.[522] They warmed to a politics that focused on growth over distribution.[523] They found an anti-bureaucratic and pro-consumer-choice notion of freedom congenial. Neoliberal frameworks that conceptualized government bureaucrats as oppressive paternalists who could never truly understand the market and consumer choice as the highest expression of freedom fit nicely. When neoclassically trained economists took over most policy thinking for the Democratic Party, the left wing of neoliberalism took shape.[524]

Clinton at first renewed the Chairpersonship of Bush-appointee Janet Steiger.[525] When her term ended, he appointed Robert Pitofsky.[526] Pitofsky, as we have seen, had been on the staff that drafted the 1969 ABA Report and then the Director of Consumer Protection for the initial expansions of unfairness in the first half of the 1970s.[527] By the Pertschuk era, he had become a Commissioner.[528] His signature is on the Unfairness Policy Statement.[529] Although he helped expand the authority of the FTC, he had been inclined towards neoliberal tendencies of thought even then, writing an article titled *Beyond Nader* in 1977 to argue for an approach to advertising more informed by information economics.[530] And he became increasingly conservative over time on consumer protection matters. Pitofksy's FTC mostly avoided using the unfairness authority and mostly adopted the terms of debate that Miller had laid out.[531] His agency was embarrassed when state attorneys general reached a settlement

---

521 Cebul, *supra* note 405, at 140.

522 *Id.* at 159 (noting an emerging disregard for traditional working-class sectors).

523 *Id.*

524 On these shifts, see *id.*; LILY GEISMER, DON'T BLAME US: SUBURBAN LIBERALS AND THE TRANSFORMATION OF THE DEMOCRATIC PARTY (2014) (examining the change in focus of the Democratic Party towards suburban, white-collar professionals); STEPHANIE L. MUDGE, LEFTISM REIINVENTED: WESTERN PARTIES FROM SOCIALISM TO NEOLIBERALISM 260–96 (2018) (examining the shift in who the Democratic Party considered to be experts).

525 HOOFNAGLE, *supra* note 49, at 75.

526 *Id.*

527 *Id.*

528 *Id.*

529 *FTC Policy Statement on Unfairness*, *supra* note 42.

530 *See* Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 670–71 (1977).

531 *See* HOOFNAGLE, *supra* note 49, at 75 ("Pitofsky believed that the Agency's unfairness power . . . was politically dangerous and he was reluctant to employ it."); Robert Pitofsky, *Advertising Regulation's 'State of the Union*,' ED. & PUBLISHER, Apr. 6, 1996, at

with the tobacco industry prohibiting "Joe Camel" advertising to children as unfair after the FTC had determined that available evidence did not support a link between ads and smoking.[532] As Muris himself put it, "[c]autious use of unfairness was a hallmark of the Pitofsky Commission in the 1990s" and, "on consumer protection, differences [between Muris's and Pitofksy's position] were largely inconsequential."[533]

The modern meaning of unfairness was cemented when Muris returned to the FTC, this time as Chair, during the George W. Bush Administration. In the meantime, Muris had alternated between serving as counsel for firms representing businesses that had business in front of the FTC—including several multi-level marketing firms—and advising Republican presidential candidates.[534] He had also served as a professor at George Mason University, which had begun to build a pipeline of business-friendly bureaucrats, flush with tens of millions of dollars of donations from businesses with an interest in keeping the FTC neutered.[535]

Muris's innovation as Chair was to move beyond consumer sovereignty as a mere anti-regulatory bias and to begin to use it to guide a positive vision of how unfairness authority should be used. With Howard Beales as the Director of Consumer Protection—the first economist to serve in this role—the Muris-era FTC dusted off the unfairness authority as a way to develop minimum standards for data security on the internet and to create a Do Not Call List to enable

56, 56 (describing advertising regulation as in good condition and praising advertising self-regulation).

532 *See* John Harrington, *Up in Smoke: The FTC's Refusal to Apply the "Unfairness Doctrine" to Camel Cigarette Advertising*, 47 Fed. Commc'ns. L.J. 593, 594–95 (1995) (providing background information on the Joe Camel advertising campaign and the FTC's evidentiary findings); Dara J. Diomande, *The Re-Emergence of the Unfairness Doctrine in Federal Trade Commission and State Consumer Protection Cases*, 18 Antitrust 53, 55 (2004) (stating that the 1997 Joe Camel case was dismissed as moot after the settlement in 1998). Thanks to Samuel Levine for pointing out this controversy to me.

533 Timothy J. Muris, *Robert Pitofsky: Public Servant and Scholar*, Fed. Trade Comm'n (June 12, 2001), https://www.ftc.gov/public-statements/2001/06/robert-pitofsky-public-servant-and-scholar.

534 On Muris's jobs with conservative politicians and representing companies, see Muris, *supra* note 492. On Muris's role representing multi-level marketers see Robert L. FitzPatrick, The Main Street Bubble: A Whistle Blower's Guide to Business Opportunity Fraud 14–15 (2010), https://archive.org/details/TheMainStreetBubbleAWhistleBlowersGuideToBusinessOpportunityFraud/mode/2up?q=muris.

535 *See generally* Tech Transparency Project, Big Tech's Backdoor to the FTC (2021), https://www.techtransparencyproject.org/sites/default/files/Big-Techs-Backdoor-to-the-FTC_031221.pdf; *Big Tech's Backdoor to the FTC*, Tech Transparency Project (Mar. 12, 2021), https://www.techtransparencyproject.org/articles/big-techs-backdoor-ftc.

consumers to opt out of exposure to telemarketing.[536] Muris and Beales avoided what Muris called "cumbersome rulemaking designed to transform entire industries" in favor of setting industry standards through a case-by-case approach.[537]

Muris and Beales both steadfastly defend the consumer sovereignty vision, but their legacy cannot be made sense of entirely on its terms. The Do Not Call List certainly reflects the principles of consumer sovereignty in the sense that it makes the protection from telemarketers something that consumers have to opt into.[538] But internet privacy enforcement has a more ambiguous relationship to conservative sovereignty. As Daniel Solove and Woodrow Hartzog have documented, the common law of privacy developed during the Muris era moved away from a focus on remedying information gaps and policing deception and towards the process of developing substantive norms based on what a reasonable consumer might expect.[539] Although this development has been conservative in the sense that it has been slow and reliant on case-by-case adjudication, it has not been focused on promoting "economically rational" decisions as much as it has involved accepting that consumer choice cannot really guide privacy policy and asking what the minimal standards for privacy ought to be.[540]

## Coda

It was to justify the new incarnation of unfairness enforcement that Beales gave the speech that we peeked in on at the beginning of this Article.[541] Now we can return to that conference room in Washington, D.C. to revisit his story. Recall that it is the American

---

536 Hoofnagle, *supra* note 49, at 78 (describing the no-call list and the beginning of data security standards); *see also* J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 Geo. Wash. L. Rev. 2157 (2015) (articulating their view of the role of regulation and how unfairness should be used in areas like privacy enforcement).

537 Muris, *supra* note 533.

538 Indeed, it is hard to understand why one would design a regulation that prevents unwanted phone solicitations to be opt-in *unless* one believes in consumer sovereignty. Why should we assume that people want to receive unsolicited advertisements unless they do enough research to know how to place themselves on the Do Not Call List? For that matter, why should we assume that only the receivers of such calls could be harmed by receiving them? Are we not all made worse off when we are conditioned to be suspicious of unexpected calls or (in the world of caller ID) calls from unfamiliar numbers?

539 *See* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 638–43 (2014); *see also* Hoofnagle, *supra* note 49, at 78 (describing their "harms-based" approach).

540 *See* Solove & Hartzog, *supra* note 539, at 648–66 (describing the evolution of FTC privacy jurisprudence and analyzing trends).

541 *See supra* Section I.A.

Marketing Association footing the bill, and the audience is full of people whose livelihood depends on producing business propaganda (as well as many academics who study them—whether or not receiving their funding).

If they had any sense of the regulatory history, these listeners would have had every reason to be wary of unfairness's revival. The FTC would not have its UDAP authority at all were it not for the campaign to regulate advertising in the 1920s and 1930s. Even before the Wheeler-Lea Act, the FTC used its unfair methods of competition authority to put patent medicine companies out of business and to enforce community morals against overly aggressive advertising to children. Once consumer unfairness authority got going in earnest in the 1960s, it was immediately used to clamp down on cigarette advertising and soon after to compel all advertisers to substantiate factual claims. As it expanded its scope, it was nearly used to shut down all television advertising directed at children, which many advertisers at the time interpreted as the first step towards ruin.

Surely Beales has not intentionally chosen a hostile audience to make his big announcement about the good work the FTC is doing. And his speech does not treat the audience as hostile. So he must be here to elaborate the meaning of unfairness in a way that an audience that makes its money by convincing people to buy things they don't need will find acceptable. Seen in this light, Beales is making clear that he agrees that the old, more threatening, type of unfairness is bad, and the new type is not like it. His historical narrative is told from the perspective of those who have been most threatened by the FTC's unfairness authority.

Now things begin to fall more clearly into place. Remember that proposed-but-not-adopted rule that "would have required advertisers to use only the precise terms the Food and Drug Administration required on product labeling" that Beales presented as his only example of the "absurd and harmful results" of the FTC's old approach to unfairness?[542] The example seems plucked from nowhere until one realizes that the rule would have cut out a major revenue stream for the advertising industry while expressively undermining the value of advertising in communicating product information. Surely if anybody were to find such a rule "absurd and harmful" it would be the members of the American Marketing Association.[543]

---

542 *See supra* note 34 and accompanying text.

543 I am not suggesting that this proposed regulation was a good idea as proposed. The fact that it was scrapped indicates that even the wild FTC of the 1970s thought it was ill thought through. (Which is not to say I agree with the FTC's decision either!) What I am

Similarly, KidVid is certainly a cautionary tale if you're an advertiser; but what if you're not?[544] There is good reason to believe we would be a significantly healthier country—and that thousands and thousands of early deaths would have been prevented—had the FTC proceeded with its Children's Advertising Rulemaking. Evidence for the link between sugar and a number of diseases—obesity, (Type 2) diabetes, and heart disease especially—has only grown in the years since the FTC abandoned its rulemaking.[545] All of these diseases have become leading killers of Americans since the 1970s. Childhood diabetes rates have more than tripled, and childhood obesity rates have more than doubled.[546] After reviewing the evidence for the various health effects of sugar in 2015, the World Health Organization recommended substantially reducing sugar intake, ideally to less than five percent of calorie intake.[547] The average American child consumes more than three times that amount of sugar.[548] Psychologists and public health experts largely agree that this result is in part because the food industry continues to spend massive amounts of money spreading disinformation—including via advertising—about sugar's effects.[549] Research since the 1970s has only strengthened the support

calling attention to is not the wisdom (or not) of the regulation itself, but rather the reason that Beales might have used it as an example.

544 Unlike with the previous example, I am here taking a favorable view of regulating and even banning at least some advertising to children. Which is not to say that I am taking a position on the exact form that the regulation of advertising to children should take.

545 *See* World Health Org., Guideline: Sugars Intake for Adults and Children (2015), https://www.who.int/publications/i/item/9789241549028.

546 *See Childhood Obesity Facts*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/obesity/data/childhood.html (last updated June 24, 2019); *Obesity Rates & Trend Data*, State of Childhood Obesity, https://stateofchildhoodobesity.org/data (last visited Jan. 9, 2020).

547 World Health Org., *supra* note 545, at 16.

548 *Know Your Limit for Added Sugars*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/nutrition/data-statistics/know-your-limit-for-added-sugars.html (last updated Apr. 3, 2019).

549 *See* Jennifer L. Harris, Amy Heard & Marlene B. Schwartz, Yale Rudd Ctr. for Food Pol'y & Obesity, Older but Still Vulnerable: All Children Need Protection from Unhealthy Food Marketing (2014), http://www.uconnruddcenter.org/files/Pdfs/Protecting_Older_Children_3_14.pdf (describing the negative impact of food marketing on children's health); Matthew A. Lapierre, Frances Fleming-Milici, Esther Rozendaal, Anna R. McAlister & Jessica Castonguay, *The Effect of Advertising on Children and Adolescents*, 140 Pediatrics S152, S153 (2017) (conducting a literature review). *See also* Mary Story & Simone French, *Food Advertising and Marketing Directed at Children and Adolescents in the US*, 1 Int'l J. Behav. Nutrition & Physical Activity 3 (2004) (describing the significant effects of advertising on children and the absence of regulation); Gary Taubes & Cristin Kearns Couzens, *Big Sugar's Sweet Little Lies*, Mother Jones, https://www.motherjones.com/environment/2012/10/sugar-industry-lies-campaign (last visited Dec. 30, 2020) (summarizing the decades-long campaign of the sugar industry to cast doubt on scientific evidence linking sugar to negative health consequences); Cristin E. Kearns, Laura A. Schmidt & Stanton A. Glantz, *Sugar Industry*

for the proposition that advertising of sugary—or other unhealthy—foods is both deeply harmful and the predominant form of food advertising to children. Recent research has indicated that advertising may be at least as effective on adolescents.[550]

And what about for unfairness more broadly? We have seen that the fuzzy meaning of "unfair"—the very lack of certainty it provides to business—is no accident. Congress in 1914 and again in 1938 sought to empower the FTC to facilitate democratic deliberation over moral standards for business conduct and to enforce those standards. The FTC was supposed to empower those who found their interests ill-served by business, especially big business, to restructure markets so that those interests were better served.

These Congresses failed to anticipate the level of political struggle that would be necessary to enable those interests to be represented at the FTC. They failed to anticipate the difficulty of maintaining the coalitions necessary to keep the FTC on track and the ease with which big business could coopt the FTC for its own purposes. Yet an evolving set of coalitions did periodically emerge. For a decade at midcentury, with the sustained mobilization of the third-wave consumer movement, it even seemed that the FTC might finally be developing the capacities to facilitate public deliberation over the consumer interest in many different markets. But, as with so many other elements of the "rights revolution" of that era, the possibility of deeper democracy collapsed with the crisis of the 1970s, the business backlash, and the political realignment that followed.

The substantial injury test, the consumer sovereignty vision of consumer protection, and the story we tell about what happened in the 1970s are all the result of this realignment. In Beales's narrative, these shifts are almost logically connected, but we might doubt how much to conclude from their historical coincidence. We have seen, for instance, that the FTC never concluded that KidVid was not justified under the substantial injury or the consumer sovereignty test. Rather, the FTC abandoned the regulation because it was facing unprecedented pressure from those who would be affected by it and their comrades in arms from other industries. The justification the FTC

*and Coronary Heart Disease Research: A Historical Analysis of Internal Industry Documents*, 176 JAMA Internal Med. 1680 (2016) (finding evidence that the sugar industry deliberately and successfully influenced scientific literature to downplay the risks of sugar while emphasizing fat as the main driver of poor dietary health).

550 *See* Story & French, *supra* note 549 (concerning advertising's effect on adolescents); *see also* Pierre Dubois, Rachel Griffith & Martin O'Connell, *The Effects of Banning Advertising in Junk Food Markets*, 85 Rev. Econ. Stud. 396, 397 (2018) (finding that banning advertising of potato chips reduces consumption of potato chips and somewhat increases purchase of healthy alternatives).

offered for doing so—which could not be taken entirely at face value—focused on implementability. We have also seen that the Unfairness Policy Statement was not an unqualified declaration in favor of the neutralizing discourses of neoclassical welfare economics, nor was it a reframing of unfairness authority to exclude the possibility of regulating advertising to children (quite the opposite). Separating out the several shifts that occurred at roughly the same time opens up space for rethinking the available possibilities for the unfairness authority. Attending to the political coalitions that shape the meaning and use of the authority opens up space for reconsidering in whose interests the authority is being used.

Which brings us back to the Senate hearings that started this Article. It was during Muris's and Beales's tenure at the FTC that the subprime mortgage industry ballooned into the bubble that would produce the 2007 financial crisis. The FTC did bring scattered enforcement actions, but it did so only in egregious and easily proven cases. All of the cases settled—for a grand total of $320 million in fines and damages.[551] For a sense of scale: the National Mortgage Servicing Settlements were for $25 billion, and that was *only* for servicing fraud *and* it was "let[ting] the banks off cheap" according to New York Attorney General Eric Schneiderman.[552] (Meanwhile the CEOs of major banks made tens or hundreds of millions of dollars in income over the course of this time period; hedge fund managers were making

---

[551] *Improving Consumer Protections in Subprime Lending: Hearing Before the Subcomm. on Interstate Com., Trade, & Tourism of the S. Comm. on Com., Sci., & Transp.*, 110th Cong. 13 (2008) (statement of Lydia B. Parnes, Director, Bureau of Consumer Protection, Federal Trade Commission) (stating the total monetary damages of all the FTC actions). For the list of actions provided by the FTC itself, see *id.* at 13 n.12 (citing FTC v. Safe Harbour Found. of Fl., Inc., No. 08-1185 (N.D. Ill. 2008); FTC v. Mortgages Para Hispanos.com Corp., No. 06-00019 (E.D. Tex. 2006); FTC v. Ranney, No. 04-1065 (D. Colo. 2004); FTC v. Chase Fin. Funding, No. 04-549 (C.D. Cal. 2004); United States v. Fairbanks Capital Corp., No. 03-12219 (D. Mass. 2003); FTC v. Diamond, No. 02-5078 (N.D. Ill. 2002); United States v. Mercantile Mortgage Co., No. 02-5079 (N.D. Ill. 2002); FTC v. Associates First Capital Corp., No. 01-00606 (N.D. Ga. 2001); FTC v. First Alliance Mortgage Co., No. 00-964 (C.D. Cal. 2000); United States v. Action Loan Co., No. 00-511 (W.D. Ky. 2000); FTC v. NuWest, Inc., No. 00-1197 (W.D. Wash. 2000); United States v. Delta Funding Corp., No. 00-1872 (E.D.N.Y. 2000); FTC v. Barry Cooper Prop., No. 99-07782 (C.D. Cal. 1999); FTC v. Capitol Mortgage Corp., No. 99-580 (D. Utah 1999); FTC v. CLS Fin. Serv., Inc., No. 99-1215 (W.D. Wash. 1999); FTC v. Granite Mortgage, LLC, No. 99-289 (E.D. Ky. 1999); FTC v. Interstate Res. Corp., No. 99-5988 (S.D.N.Y. 1999); FTC v. LAP Fin. Serv., Inc., No. 99-496 (W.D. Ky. 1999); FTC v. Wasatch Credit Corp., No. 99-579 (D. Utah 1999); In re First Plus Fin. Group, Inc., FTC Docket No. C-3984 (2000); In re Fleet Fin., Inc., FTC Docket No. C-3899 (1999); FTC v. Capital City Mortgage Corp., No. 98-00237 (D.D.C. 1998)).

[552] DAVID DAYEN, CHAIN OF TITLE: HOW THREE ORDINARY AMERICANS UNCOVERED WALL STREET'S GREAT FORECLOSURE FRAUD 278 (2016) (discussing the mortgage settlement).

around one billion dollars *per year* during the time period.)[553] The FTC never adopted an overall enforcement strategy to stamp out the systemic abuses that scholars and consumer advocates were crying foul about,[554] let alone considered any new regulations to address systemic problems.[555]

Senators trying to figure out why regulators did not prevent the financial crisis were right to ask the FTC why, with such a broad authority to declare commercial practices "unfair," it did not attempt to root out the coercive practices and lopsided contracts that fed the metastasis of the subprime bubble. They were wrong to accept the answer that the ban on "unfair acts and practices" is just too narrow a grant of authority.[556] The problem was not the narrowness of the law. It was the narrowness of the neoliberal frameworks—and of the deference to representatives of big business—that had by then become common sense among those charged with implementing it.

If unfairness is understood as an exceptional characteristic of consumer markets and as something that can usually best be corrected for by markets themselves, then a ban on unfairness in consumer-facing markets looks like something to be used only in egregious cases. If one spends much of one's time listening to and working for the owners and managers of big business entities (especially as their representative in front of the FTC), one tends to tune out consumer advocates as crying wolf. If one thinks that the defining value of market competition is that it puts the consumer in the driver's seat, it becomes difficult to appreciate that consumers might be systematically taken advantage of even in highly competitive markets.

---

553 Adam Tooze, Crashed: How a Decade of Financial Crises Changed the World 65 (2018) (discussing salary levels).

554 *See* Jennifer Taub, Other People's Houses: How Decades of Bailouts, Captive Regulators, and Toxic Bankers Made Home Mortgages a Thrilling Business 279 (2014) ("Plenty of people saw [the financial crisis] coming, and said so. . . . Yet most whistleblowers were ignored or ridiculed at best, and fired and blacklisted at worst."). *Cf.* Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 Tex. L. Rev. 1255, 1259 (2002) (proposing a new duty of suitability in the subprime mortgage market after analyzing the lack of existing strategies to curb predatory lending); Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 Fordham L. Rev. 2039, 2084 (2007) (suggesting the FTC should declare predatory practices a violation of the FTC Act); Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121, 134, 138–39 (2008) (describing the regulatory framework for mortgage servicing as "fractured" and emphasizing the lack of cases brought by the FTC); Dayen, *supra* note 552, at 66–72 (discussing the scattered blogs of people who were documenting various forms of fraud in the mortgage market).

555 The FTC did have limits to its jurisdiction over financial entities.

556 *See supra* Introduction.

But systematic advantage taking was exactly what was happening in the subprime mortgage market of the early 2000s. Mortgage originators competed to sell mortgages on which borrowers were likely to default, mortgage servicers competed to extract as much money as possible from debtors regardless of the terms of their agreement, etc.[557] Financial firms throughout the industry made more money (before the bubble popped) as they treated consumers worse. They did especially well by exploiting the vulnerabilities created by race and class hierarchies.[558] A notion of unfairness devoted to articulating standards of fair dealing rather than figuring out how to ensure that consumers make rational decisions would focus on these structural problems as worthy of redress.

In retrospect, 2007 was too soon to reconsider the meaning of unfair acts and practices. The rupture the financial crisis was creating penetrated deeper than anybody in that room appreciated. Because of that crisis, neoliberalism itself may now be in question.[559] Nobody knows what will come next, but a new coalition does seem to be developing with the will, the power, and the vision to rebuild the state capacity to democratize control over business conduct. If this coalition is anything like those that came before, we can expect it to revisit standards of fair dealing, to retell the folklore of unfairness.

---

557 *See* TOOZE, *supra* note 553, at 64 ("By the magic of independent probabilities, the worse the quality of the [mortgage] debt that entered into the tranching and pooling process [that transformed that debt into an asset saleable on international capital markets], the more dramatic the effect [on banks' profitability] . . . ."); Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177 (2012) (arguing that the mortgage bubble was driven by demand in the financial markets for the assets produced by securitized mortgage issuance, not by demand among consumers for houses); TAUB, *supra* note 554 (same); DAYEN, *supra* note 552.

558 *See* Jacob W. Faber, *Racial Dynamics of Subprime Mortgage Lending at the Peak*, 23 HOUS. POL'Y DEBATE 328 (2013) (offering empirical evidence for the theory that wealthier minorities were deliberately targeted for subprime loans); Michael Powell, *Bank Accused of Pushing Mortgage Deals on Blacks*, N.Y. TIMES (June 6, 2009), https://www.nytimes.com/2009/06/07/us/07baltimore.html (recounting evidence that Wells Fargo specifically targeted Black people for "ghetto loans"). *See generally* KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019) (situating subprime lending as a form of "predatory inclusion" by which Black people were included in the mortgage market on extractive terms).

559 On this political rupture being caused by the financial crisis, see TOOZE, *supra* note 553. *See generally* GÉRARD DUMÉNIL & DOMINIQUE LÉVY, THE CRISIS OF NEOLIBERALISM (2011) (exploring the effects of the subprime loan crash on neoliberalism and arguing that neoliberalism as a stage of capitalism has entered an ongoing crisis).